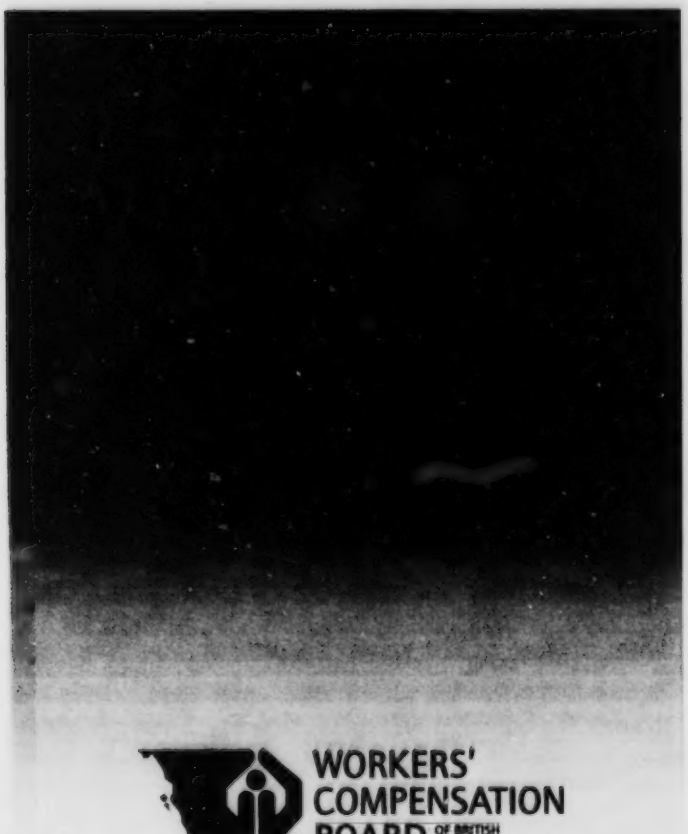
ANNUAL REPORT OF THE APPEAL DIVISION

For the 12 month period ending Dec. 31, 1999



WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

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ANNUAL REPORT

OF THE

APPEAL DIVISION

For the period January 1 to December 31, 1999

WORKERS' COMPENSATION BOARD
OF BRITISH COLUMBIA

Submitted by:
Herb Morton
Acting Chief Appeal Commissioner
March 2, 2000

TO: THE PANEL OF ADMINISTRATORS

I am pleased to present this ninth annual report of the Appeal Division, for the year 1999.

The Appeal Division experienced significant developments during 1999. These included changes to our composition, to our jurisdiction in occupational health and safety matters, and to the policies governing public access to our decisions.

The Appeal Division issued 2,020 decisions in 1999, close to our record of 2,035 decisions issued in 1998. The largest single category of decisions in 1999 concerned appeals from Review Board findings (1,374 out of the 2,020 decisions). There was a seven percent decrease in the number of new appeals of Review Board findings received by the Appeal Division during 1999, but increases in other areas including section 11 applications and assessment appeals. In fact, the Appeal Division received ten percent more new matters in 1999 than our previously most active year (5,249 in 1999, as compared to 4,764 in 1998). However, 2,967 of these new matters involved appeals seeking relief of costs under section 39(1)(e), the vast majority of which tend to be withdrawn after the employer obtains file disclosure. In this regard, the Appeal Division has dealt with 5,455 appeals related to relief of costs in 1997, 1998 and 1999. Over 5100 of these appeals (94%) were withdrawn prior to an Appeal Division panel having to adjudicate on the appeal.

Maureen Nicholls, our chief appeal commissioner since 1996, accepted a new appointment as Commissioner of the Public Service Employee Relations Commission. The Appeal Division greatly benefited from Maureen's leadership.

Maureen left the Appeal Division a better tribunal, having initiated a strategic planning process which resulted in the *Hallmarks of Quality Decisions* (15 W.C.R. 111), and the *Code of Conduct for Appeal Commissioners* (15 W.C.R. 113). During 1999, she undertook the selection of five new appeal commissioners — Rob Kyle, P. Michael O'Brien, Heather McDonald, Daphne Dukelow, and Mike Carleton.

She initiated preparations in the Appeal Division for the bringing into force of Bill 14, the *Workers Compensation (Occupational Health and Safety) Amendment Act, 1998*. Maureen also committed the Appeal Division to make recommendations to the Panel of Administrators respecting mechanisms to provide greater access to unpublished Appeal Division decisions.

Appeal commissioners Alex Brokenshire, Verna Ledger, Walt Peain, and Derrick Spooner retired in 1999. They were founding members of the Appeal Division, who made significant contributions to the decision-making and life of the Division from its inception in 1991 to 1999.

October 1, 1999 marked the coming into force of Bill 14, containing significantly expanded appeal rights to the Appeal Division in occupational health and safety matters. A practice and procedure directive was issued on October 1, 1999 (*Decision #27*), to assist parties in the appeal process. This directive is available on the internet at:

http://www.worksafebc.com/policy/appeals/27.PDF.

The Panel of Administrators issued a resolution on November 19, 1999 authorizing the Appeal Division to issue decisions in a publicly accessible form. In December 1999, guidelines were issued (*Decision No. 29*) for writing decisions without identifiers. All decisions since January 1, 2000 are written in a form that can be posted to the WCB Internet web site. Work is in progress toward establishing the web site with a search engine, to allow public access to all Appeal Division decisions since January 1, 2000.

Once the web site is fully functional with all decisions posted from January 1, 2000, consideration will be given to a further project for the editing for privacy of the approximately 15,000 past Appeal Division decisions from 1991 to 1999, so they may also be made public.

This new approach represents a major development for the workers' compensation system, which will enhance the openness and accountability of the appeal process.

Public access to Appeal Division decisions is an initiative that stems from a recommendation of the Royal Commission. As steps for implementation are well underway, an objective of the Appeal Division for 2000 will be to further review the recommendations of the Royal Commission to identify matters where the Appeal Division can take action.

The work of the Appeal Division is accomplished through the efforts of all its members, from administrative and secretarial staff to appeal commissioners. They demonstrate an ongoing commitment to serve with diligence and integrity, in fulfilling the many responsibilities of the Appeal Division. I take this opportunity to thank each member of the Division for their extraordinary efforts in the past year.

While this annual report was being prepared we were saddened to learn of the passing, on February 4, 2000, of William (Bill) I. Beeby. Bill's history with the appeal process in workers' compensation matters was long and illustrious. He was a founding member of the Boards of Review where he served from 1974 to 1991, and of the Appeal Division where he served from 1991 until his retirement in 1994. He was well known for his common sense and practical approach to decision-making.

Finally, we have received news of the appointment of John Steeves as the new chief appeal commissioner, effective March 6, 2000. We look forward to the continuing development of the Appeal Division under his leadership.

H. Morton

Herb Morton
Acting Chief Appeal Commissioner

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1. APPOINTMENTS AND REMUNERATION

There were several changes concerning appeal commissioners in 1999:

New appointments:

- **Robert Kyle** was appointed as a representational appeal commissioner from an employer interest perspective, effective January 18, 1999. Before joining the Appeal Division, Rob was a self-employed Registered Professional Forester and Chartered Arbitrator who graduated from the University of British Columbia with a B.Sc. in Forestry in 1981. Between 1996 and 1999 Rob was a member of the British Columbia Forest Appeals Commission. From 1992 Rob served on *ad hoc* forest appeal boards appointed through Order in Council under the Forest Act.

- **P. Michael O'Brien** was sworn in as a non-representational appeal commissioner on August 16, 1999. Mike brings back to the Appeal Division a wide range of adjudicative experience in workers' compensation matters having most recently been chair of the Workers' Compensation Review Board from July, 1994. Prior to that Mike was an appeal commissioner in the Appeal Division, having been with the Appeal Division since its creation in June, 1991.

- **Heather McDonald** was sworn in September 7, 1999 as a part-time non-representational appeal commissioner. Immediately prior to her appointment as an appeal commissioner, Heather was the Board's Freedom of Information Coordinator since 1994. Prior to that Heather practiced law and gained a great deal of adjudicative experience as a vice-chair at the provincial Industrial Relations Council/Labour Relations Board from 1988 to 1992.

- **Daphne Dukelow** was sworn in as a non-representational appeal commissioner on October 12, 1999. Daphne graduated from law school at the University of Western Ontario in 1972 and received her Master of Laws degree in public law from Osgoode Hall Law School in Toronto in 1983. Daphne brings to the Appeal Division her extensive adjudicative experience. From 1979 to 1988 Daphne was

a member of the Board of Commissioners with the Ontario Residential Tenancy Commission. That appointment occurred while Daphne was counsel, from 1974 to 1988, in the Crown Law Office, Civil, Ministry of the Attorney-General, Province of Ontario. Following her move to British Columbia, Daphne gained further quasi-judicial adjudicative experience from 1995 as a member of the British Columbia Arbitration Review Panel under the Residential Tenancy Act. From March, 1998 until immediately before her appointment as an appeal commissioner, Daphne was chair of the Arbitration Review Panel.

- **Michael Carleton** was sworn in as a worker-representative appeal commissioner on November 16, 1999. Mike has a broad range of experience in workers' compensation. He was a workers' adviser from 1993 to October 1997, during which time he represented workers on appeals, as well as provided training to unions and interest groups concerning Workers' Compensation Board policies and appeals. Immediately prior to his appointment as an appeal commissioner, Mike was a client service manager with the Board since March, 1998. Mike worked as a rehabilitation consultant from 1981 to 1989, and as a claims adjudicator from 1971 to 1981. Mike also has an extensive background in advocacy for persons with disabilities. He served as executive director of the Premier's Advisory Council for Persons with Disabilities from 1989 to 1993. From 1993 to the present, Mike has been a member of the board of directors of the Disabled Workers' Foundation, which has responsibility for the National Institute of Disability Management and Research.

- Non-representational appeal commissioner **Judith Williamson**, who left the Appeal Division in September, 1998, was re-appointed on a part-time basis in February, 1999. Her responsibilities relate primarily to consideration of cases under the Criminal Injury Compensation Act.

- Deputy chief appeal commissioner **Herb Morton** was appointed by the Panel of Administrators as acting chief appeal commissioner, effective August 3, 1999, following the end of **Maureen Nicholls'** term as chief appeal commissioner. Herb had been deputy chief appeal commissioner since December 1, 1998 and a non-representational appeal commissioner since 1995.

- Non-representational appeal commissioner **Sonja Hadley** was appointed Acting Deputy Chief Appeal Commissioner on November 16, 1999. Sonja has been an appeal commissioner since 1991 and was the Registrar of the Appeal Division from June, 1995 to June 1996.

Departures:

- Chief appeal commissioner **Maureen Nicholls** completed her third year as chief appeal commissioner and returned to the public service in September 1999. Maureen was the Appeal Division's second chief appeal commissioner. Under Maureen's leadership the Appeal Division made significant progress in its strategic planning processes. Her enthusiasm, integrity and strong leadership qualities assisted the Appeal Division greatly during her tenure. She returned to the public service as the commissioner of the Public Service Employee Relations Commission.

- Non-representational appeal commissioners **Alex S. Brokenshire** and **Walter N. Peain**, employer-representative appeal commissioner **Derrick Spooner**, and worker-representative appeal commissioner **Verna Ledger**, all retired in 1999. All four appeal commissioners were among those who joined the Appeal Division at its inception in June, 1991. They served the Appeal Division and the workers' compensation community with distinction over these past several years.

Other changes:

- Non-representational appeal commissioner **Laura Bradbury** moved from a full-time to a part-time position in late 1999 as she began to be based out of Victoria, British Columbia. This first instance of an appeal commissioner being based outside Richmond is on a trial basis. Laura has been provided office space in the Board's area office in Victoria. This move will facilitate the scheduling of oral hearings on Vancouver Island.

- Non-representational appeal commissioner **Anne-Marie Drosso** began a one-year leave of absence in September, 1999.

- Non-representational appeal commissioners **Hilrie Reimer** and **Grant McRitichie** moved to part-time appeal commissioner positions in 1999 for terms ending, respectively, in August and September, 2000.

As of January 1, 2000 the Appeal Division consisted of the acting chief appeal commissioner, the acting deputy chief appeal commissioner, and twenty-three appeal commissioners as follows:

		Term Expires
(a)	**14 full-time, non-representational appeal commissioners**	
	Patrick L. Byrne	December 31, 2001
	Jill Callan	December 31, 2001
	Anne-Marie Drosso (on leave)	December 31, 2001
	Daphne Dukelow	October 3, 2001
	Cassandra Kobayashi	December 31, 2001
	Randy Lane	December 31, 2001
	Jane MacFadgen	December 31, 2001
	Marguerite Mousseau	December 31, 2001
	Michael O'Brien	August 15, 2000
	Lorna Pawluk	December 31, 2001
	Paul Petrie	December 31, 2001
	Gail Starr	December 31, 2001
	J. David Van Blarcom	December 31, 2001
	Teresa White	December 31, 2001
(b)	**5 part-time, non-representational appeal commissioners**	
	Laura Bradbury	December 31, 2001
	Heather McDonald	September 6, 2001
	A. Grant McRitchie	September 6, 2000
	Hilrie Reimer	August 15, 2000
	Judith Williamson	June 30, 2000
(c)	**4 full-time, representational appeal commissioners**	
	Worker interest perspective	
	Sarwan Boal	December 31, 2001
	Michael Carleton	November 14, 2001
	Employer interest perspective	
	Rob Kyle	December 31, 2001
	James L. Tonn	December 31, 2000

Appeal Commissioner salaries are $84,821 per annum for non-representational appeal commissioners and $81,718 per annum for representational appeal commissioners.

Herb Morton's annual salary as acting chief appeal commissioner is $115,733. His term as acting chief appeal commissioner expires on March 6, 2000 with the appointment of John Steeves as chief appeal commissioner.

Sonja Hadley's annual salary as acting deputy chief appeal commissioner is $94,421.

The rates for part-time appointments paid on a *per diem* basis are $395.00 per day for non-representational appeal commissioners and $345.00 per day for representational appeal commissioner.

2. PLANNING, EDUCATIONAL AND OTHER ACTIVITIES OF THE APPEAL DIVISION

(a) Planning

Progress continued during 1999 for the three-year strategic planning the Appeal Division began in late 1997 and reported upon in that year's annual report. An important part of the strategic planning was in the area of increasing the access and accountability of the Appeal Division. In this regard, the 1998 annual report indicated that the Appeal Division would be examining and making recommendations to the Panel of Administrators respecting mechanisms to provide greater access to unpublished Appeal Division decisions, while ensuring compliance with the confidentiality and privacy provisions of the Workers Compensation Act and the Freedom of Information and Protection of Privacy Act.

The commitment was made in light of recommendation #63 of the Report of the Royal Commission on Workers' Compensation of British Columbia (January 1999) which stated, in part, that the Workers Compensation Act should be amended to "require the Appeal Tribunal to publish all decisions in a manner which does not identify the parties". The commissioners commented:

> The commission believes that granting the public full access to "de-identified" decisions will help to promote consistency and predictability throughout the claims adjudication and appeal systems.
>
> [Chapter 9, page 43]

The Appeal Division brought forth proposals for consideration by the Panel of Administrators in the fall of 1999, resulting in a November 1999 resolution of the Panel of Administrators which directed, in part, that:

- Appeal Division decisions under the *Act*, and under *the Criminal Injury Compensation Act*, generally be written without reference to identifiers effective no later than January 1, 2000;

- Appeal Division decisions under Part 3 of the *Act* (as amended October 1, 1999 by Bill 14, the *Workers Compensation*

(Occupational Health and Safety) Amendment Act), generally be written without reference to identifiers effective from the date of the resolution;

- Past and future decisions of the Appeal Division under section 11 of the *Act* filed in British Columbia court registries be made publicly available without removal of identifying information;

- In unusual circumstances where writing a decision without reference to identifiers is not practicable, the Appeal Division may include identifiers in the decision but must then prepare an edited version of the decision so as to permit public access to the decision while ensuring compliance with the confidentiality and privacy provisions of the Act and the Freedom of Information and Protection of Privacy Act;

- The Appeal Division establish an Internet website, with a search engine, which will permit public access to Appeal Division decisions without identifiers, and to unedited section 11 decisions which have been filed in British Columbia court registries.

Work is underway on the development of a website with search engine capabilities on the internet website of the Workers' Compensation Board [www.worksafebc.com]. We expect that decisions from January 1, 2000 will be posted on that internet site beginning later in 2000. Further consideration will be provided to the issue of posting the approximately 15,000 Appeal Division decisions issued from 1991 through to the end of 1999. As these decisions have not been edited for privacy considerations, they would need to be so edited before they could be posted to a public internet site.

(b) Educational activities

On-going education and training is an essential requirement of an effective administrative tribunal. In 1999, the Appeal Division continued its internal education program. This program is intended, in combination with external work shops, programs and conferences, to provide appeal commissioners with necessary information and knowledge specific to the workers' compensation field and, more generally, to emerging issues in

administrative law. Outlined below are the Appeal Division's educational activities in 1999.

The Appeal Division's on-going internal education program sponsored the following educational sessions in 1999:

- Presentation by the Board's Senior Executive Committee regarding current developments at the Workers' Compensation Board — facilitated by the Board's Senior Executive Committee.

- "New Assessment Classification System and the Experience Rated Assessment System" — facilitated by Paul Krismer, director of assessments.

- "Assessing Permanent Psychological Impairment" — facilitated by psychology director Dr. Izabela Schultz.

External educational activities included the following:

- Acting chief appeal commissioner **Herb Morton**, and non-representational appeal commissioners **Paul Petrie**, **Jill Callan**, **Gail Starr, Laura Bradbury, Marguerite Mousseau, Lorna Pawluk**, and representational appeal commissioners **Sarwan Boal and Rob Kyle** attended in Vancouver at the International Conference of the Canadian Council of Administrative Tribunals on October 10 to 12, 1999. The title of the conference was "Best Practices in Administrative Justice".

- Non-representational appeal commissioners **Jane MacFadgen, Daphne Dukelow, Marguerite Mousseau, Paul Petrie, Laura Bradbury, Jill Callan** and **Teresa White**, and assistant to the chief appeal commissioner **Gene Jamieson**, attended the November 15, 1999, 4th Annual Education Conference of the British Columbia Council of Administrative Tribunals in Richmond, B.C. entitled "Ethical Issues in Administrative Justice".

- Non-representational appeal commissioners **David Van Blarcom** and **Patrick L. Byrne**, and representational appeal commissioners **Jim Tonn**, **Sarwan Boal** and **Verna Ledger**, attended the

September 22 – 23, 1999 conference in Vancouver entitled "Occupational Hygiene Conference 1999 — Integrating Occupational Health Across Disciplines". This conference was co-sponsored by the Canadian Registration Board of Occupational Hygienists, the American Industrial Hygiene Association (B.C.–Yukon Section), and the Workers' Compensation Board of British Columbia.

- Chief appeal commissioner **Maureen Nicholls**, deputy chief appeal commissioner **Herb Morton** and assistant to the chief appeal commissioner **Gene Jamieson**, attended the Fourth International Congress on Medical/Legal Aspects of Work Injuries in Toronto, Ontario, June 6 to 9, 1999. The Congress was hosted by the Institute for Work and Health and the Ontario Workplace Safety and Insurance Board.

- Non-representational appeal commissioners **Laura Bradbury** and **Patrick L. Byrne** attended the American Industrial Hygiene Conference in Toronto, Ontario on June 5 to 11, 1999. The conference was sponsored by the American Industrial Hygiene Association.

- Non-representational appeal commissioner **Laura Bradbury** attended a national advanced programme entitled "Dispute Resolution: Administrative Tribunals and Governance" sponsored by the Institute of Dispute Resolution at the University of Victoria on October 13 to 15, 1999.

- Non-representational appeal commissioner **David Van Blarcom**, and assistant to the chief appeal commissioner **Gene Jamieson**, attended the Continuing Legal Education Society of British Columbia seminar entitled "Administrative Law — 1999 Update" in Vancouver on November 25, 1999.

- Assistant to the chief appeal commissioner **Gene Jamieson** attended a seminar entitled "Employment Law — 1999" sponsored by the Continuing Legal Education Society of British Columbia on April 23, 1999. This seminar included a session entitled "Bias and Judicial Review of the Decisions of Administrative Tribunals".

- Assistant to the chief appeal commissioner **Gene Jamieson** attended the November 19, 1999 seminar entitled "Human Rights: Disability Issues" sponsored by the Continuing Legal Education Society of British Columbia. This program included a session entitled "Human Rights Code versus Workers Compensation Act".

(c) Other activities of the Appeal Division

Members of the Appeal Division were also involved in the following activities:

- **Paul Petrie**, non-representational appeal commissioner, continued as a director (to November, 1999) of the British Columbia Council of Administrative Tribunals (BCCAT). Paul continues as a member of BCCAT's education committee. He participated in the further development and delivery of BCCAT's course "Foundations of Administrative Justice". He contributed to the planning and delivery of BCCAT's 4th Annual Education Conference entitled "Ethical Issues in Administrative Justice", held November 15, 1999 in Richmond, B.C. Paul also continued as a director (to October, 1999) of the national Council of Canadian Administrative Tribunals (CCAT). Paul continues to serve on the Council's training committee. He presented a paper entitled "Enhancing Expertise: Tribunal Training In Canada" at CCAT's International Conference, "Best Practices in Administrative Justice", held in Vancouver, October 10 to 12, 1999.

- **Judith Williamson**, part-time non-representational appeal commissioner continued to serve on the education committee of the British Columbia Council of Administrative Tribunals. In late 1998, she was one of four instructors in a four-day course in Saskatoon, Saskatchewan, to train instructors from the prairie provinces for delivery of the "Foundations of Administrative Justice" course originally created by the B.C. Council of Administrative Tribunals. In 1999, she coordinated the delivery of an adapted version of the Foundations course to five British Columbia post-secondary educational institutions, and an offering of the regular course to the British Columbia Press Council. She taught in the Foundations course on three occasions. With Laura Parkinson of the British Columbia Labour Relations Board, she taught a two-day Advanced

Decision Writing course for tribunal members sponsored by the Canadian Institute for the Administration of Justice. Under the auspices of BCCAT, the Agencies, Boards and Commissions Branch of the British Columbia government, and the Attorney General's Ministry, Judith and Human Rights Tribunal member Nitya Iyer are developing a two-day decision-writing workshop scheduled for delivery in 2000.

- **Laura Bradbury**, non-representational appeal commissioner, was co-chair of the 4th Annual Education Conference of the British Columbia Council of Administrative Tribunals held on November 15, 1999, in Richmond, B.C. The conference was titled "Ethical Issues in Administrative Justice". Laura was also elected in October 1999 to the Board of Directors of the Council of Canadian Administrative Tribunals (CCAT).

- Non-representational appeal commissioner **Patrick L. Byrne** presented a session entitled "Establishing Causation for Occupational Diseases" at the Vancouver conference entitled "Occupational Hygiene Conference 1999 — Integrating Occupational Health Across Disciplines" on September 22, 1999. This conference was co-sponsored by the Canadian Registration Board of Occupational Hygienists, the American Industrial Hygiene Association (B.C. – Yukon Section), and the Workers' Compensation Board of British Columbia. Pat also was elected national president of the Canadian Registration Board of Occupational Hygienists. In August 1999, Pat was appointed as Canada's representative on the Board of the International Occupational Hygiene Association (IOHA), a non-governmental arm of the World Health Organization (WHO). In November 1999, Pat represented Canada at meetings in London, England, with representatives of the IOHA member countries and the WHO, to establish an international occupational hygiene certification program. Pat was appointed to a working group, along with representatives of the United States, Great Britain and Sweden to draft the finai document for the program in the year 2000. At the request of the American Academy of Industrial Hygiene (AAIH), Pat published an article on Occupational Hygiene Certification in Canada in the AAIH's December 1999 national newsletter.

- Representational appeal commissioners **Sarwan Boal** and **Derrick Spooner** spoke at a class entitled "Advanced Workers' Compensation" at the Canadian Labour Congress (Pacific Region) Winter School at Harrison Hot Springs, British Columbia on February 4, 1999. They spoke about recent developments in the appeal process. Representational appeal commissioner **Verna Ledger** assisted in the presentation of the "Basic Workers' Compensation" course at the Winter School.

- **Heather McDonald**, non-representational appeal commissioner, is co-chair of the Workers' Compensation Board's joint union/management "Committee on the Care of Dependants — Focus on Work and Family" which organized a speaker series and other activities during 1999 designed to assist employees at the Workers' Compensation Board in balancing work and family life.

- **Rob Kyle**, employer-perspective representational appeal commissioner, met in September 1999 with the members of the Employers' Advisers office in Richmond, B.C. and in October 1999 with a representative of the Council of Construction Associations, to discuss the appeal process within the Appeal Division.

- Employer-perspective representational appeal commissioner **Derrick Spooner** met with the respective presidents of the Road Builders' Association and the Heavy Construction Association of British Columbia, as well as the president of the Construction Labour Relations Association of British Columbia, to discuss matters related to the appeal process of the Appeal Division.

- **Gene Jamieson**, assistant to the chief appeal commissioner, became a member of the Board of Directors of the British Columbia Council of Administrative Tribunals (BCCAT) in November, 1999 and is serving as a member of the Education Committee of BCCAT. In May, 1999, Gene participated in a focus group of tribunal representatives, sponsored by BCCAT, to facilitate development of a common code of conduct for provincial administrative tribunals. Gene is also a tribunal-sponsored instructor for the British Columbia Council of Administrative Tribunals course entitled "Foundations of Administrative Justice". In addition, Gene taught on behalf of BCCAT during offerings of the Foundations course to the British Columbia

Press Council, and a number of post-secondary educational institutions in the province during 1999. Gene also, together with Charley Beresford, Director, Co-ordination of Agencies, Boards and Commissions Branch, Provincial Ministry of Finance and Corporate Relations, presented a workshop entitled "Creating and Applying a Code of Ethics" at the 4th Annual Education Conference of the British Columbia Council of Administrative Tribunals on November 15, 1999 in Richmond, B.C. The title of the conference was "Ethical Issues in Administrative Justice".

3. MANAGEMENT AND ADMINISTRATION

As of January 1, 2000, there were, in addition to the manager, 29 staff working in the Appeal Division. Secretary Melanie Collins, appeal officer Allison Walker (who shares a position with appeal officer Dale Seth), and intake clerk Laurie Kitson were each on leave from the appeal division at this date.

The Appeal Division continues to provide four-month placements for law students from the co-operative program at the University of Victoria. The student provides legal research support to the division.

Manager	Linda Hart
Assistant to the Chief Appeal Commissioner	Gene Jamieson
Secretaries	Donna Hanson Lisa Ross Patricia Spannier
Intake Clerks	Kim Ertner (temporary position) Robyn Scott-Smith
File Clerk	Toresa Springford
Phone Control Clerks	Joan Robinson Sandhya Sharma (temporary to the position)

Appeal Officers	Morag Brown Ursula Dixon Bonnie Eisworth Linda Horvath (temporary to the position) Andrew Roznicki Doreen Russell Dale Seth Margaret Shea Anne Toews
Junior Appeal Officers	Connie Lowe (temporary position)
Appeal Secretaries	Sharon Chatlaine Ingrid Exner Janice Macrae Aviva Perez Valaine Sananin Joelynn Stokes (temporary to the position) Phoebe Tsang (temporary position) Deborah Wall (temporary to the position) Sharon Watt Ria Wildeman (temporary position)

4. EXPENDITURES

The total Appeal Division budget for 1999 was $4,444,547. The actual amount of expenditures at year-end was $3,799,550. The 1999 budget total included salaries for appeal commissioners and support staff amounting to $3,571,746, and consulting fees amounting to $666,000. Consulting fees included amounts for appeal commissioners paid on a *per diem* or secondment basis, as well as for a legal research contractor, case management and preparation for Bill 14 proclamation. An additional $206,801 was budgeted for general Appeal Division expenses which included such matters as travel for oral hearings, training, office supplies, and postage.

5. PRACTICE AND PROCEDURE

The following six practice and procedure decisions of the chief appeal commissioner or acting chief appeal commissioner were issued by the Appeal Division in 1999:

(a) Practice and Procedure Directive Regarding Contact with Appeal Commissioners by Parties Decision #24 (10 February 1999) 15 WCR 107

Section 85.1 of the Workers Compensation Act provides that the chief appeal commissioner may determine the practice and procedure for the conduct of appeals by the Appeal Division, subject to any policies, by-laws or resolutions by the governors under section 82.

This practice directive was issued to provide guidance to the workers' compensation community regarding contact between appeal commissioners and parties to Appeal Division proceedings. The practice directive was premised on the principle that parties to a proceeding are entitled to expect that the hearing of a matter will not be influenced by private communications which have not been disclosed to them. The directive indicates that care must be taken to avoid communications with appeal commissioners which would undermine the confidence of the parties and the integrity of the decision-making process. For example, the directive indicates that contact with the Appeal Division by parties with respect to proceedings should normally be conducted through administrative staff of the Appeal Division. Consequently, the Appeal Division will not normally direct telephone calls to appeal commissioners from individuals or entities related to the hearing of an appeal or other matter for adjudication by the Appeal Division.

(b) Delegation by the Chief Appeal Commissioner Decision #25 (30 June 1999)

Section 85(8) of the Workers Compensation Act authorizes the chief appeal commissioner to delegate in writing any of her powers and duties to an appeal commissioner, subject to any terms or conditions set out in the delegation. *Decision #25* delegated to appeal commissioner Jill Callan the authority to direct that the Appeal

Division reconsider a prior Appeal Division decision under the Workers Compensation Act or the Criminal Injury Compensation Act. The chief appeal commissioner retained the powers delegated, to be exercised concurrently.

(c) Delegation by the Acting Chief Appeal Commissioner Decision #26 (3 August 1999)

Pursuant to the delegation power under section 85(8) of the Workers Compensation Act, the acting chief appeal commissioner issued this delegation which contains various delegations to appeal commissioners.

(d) Appeal Practice and Procedure for Occupational Health and Safety Matters Decision #27 (1 October 1999)

This practice directive was issued in light of the coming into force of the Workers' Compensation (Occupational Health and Safety) Amendment Act 1998, S.B.C. 1998, Chapter 50, on October 1, 1999. These amendments create a new Part 3 of the Workers Compensation Act relating to occupational health and safety matters, and include appeal provisions for occupational health and safety matters in Division 14 which differ from those in the rest of the Workers Compensation Act. This practice directive sets out the practice and procedure to be followed by the Appeal Division in dealing with such appeals. The text of the directive, together with information sheets regarding filing an appeal for occupational safety and health matters, can be found on the Board's internet website at the following address:

http://www.worksafebc.com/appeal/appealdiv/filingohs.asp.

(e) Delegation by the Acting Chief Appeal Commissioner Decision #28 (16 November 1999)

Pursuant to the acting chief appeal commissioner's powers to delegate under section 85(8) of the Workers Compensation Act, this delegation appointed non-representational appeal commissioner Sonja Hadley to serve as acting deputy chief appeal commissioner of the Appeal Division.

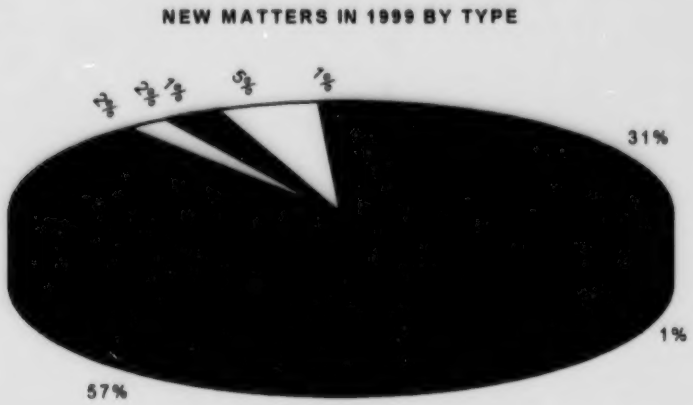
(f) Public Access to Appeal Division Decisions — Writing Decisions Without Reference to Identifiers Decision #29 (20 December 1999)

On November 19, 1999, the Panel of Administrators resolved, in part, that Appeal Division decisions under the Workers Compensation Act, and the Criminal Injury Compensation Act, would be generally written without reference to identifiers, effective no later than January 1, 2000. This was done to facilitate public access to Appeal Division decisions on an internet website to be established for edited Appeal Division decisions containing no identifiers. *Decision #29* of the Appeal Division provides general guidelines to appeal commissioners for writing Appeal Division decisions without reference to identifiers so as to ensure compliance with the confidentiality and privacy provisions of the Workers Compensation Act and the Freedom of Information and Protection of Privacy Act.

6. NEW MATTERS

(a) General

The Appeal Division received 5249 new appeals or other matters during 1999, for an average of 437 per month. This is a significant increase from the monthly average of 397 in 1998, 376 in 1997, 255 in 1996, 194 in 1995, and 155 in 1994.



Appeals from Review Board findings [s. 91]		1630	31%
Prevention [s. 73] (52) Bill 14 (20)		72	1%
Employer Relief of Costs [s. 39(1) and ERA]		*2967	57%
Assessments (73) Section 47(2) (34)		107	2%
Certificates for Court Action [s.11]		112	2%
Criminal Injuries		65	1%
Extension of Time Requests		234	5%
All other matters:		62	1%
Review Board Referrals [s. 96.4)]	(6)		
Transfer of Claim Costs [s.10(8)]	(6)		
Reconsideration Applications	(50)		
Section 96.1	(49)		
Section 96(2)	(1)		
TOTAL NEW MATTERS		5249	100%

* See comments regarding these 2967 appeals immediately after the following tables.

APPEAL DIVISION INTAKE
MONTHLY AVERAGE OF NEW MATTERS RECEIVED
1992 TO 1999

Time Period	Intake	Monthly Average
1992	1992	166
1993	2296	191
1994	1860	155
1995	2325	194
1996	3056	255
1997	4511	376
1998	4764	397
1999	5249	437

NEW MATTERS FILED TO THE APPEAL DIVISION BY YEAR

Matter Type	1999	1998	1997	1996	1995	1994	1993	1992
Section 91 from Review Board	1630	1745	1590	1482	1475	1200	1429	1206
Review Board Referrals - Section 96(4)	6	4	3	7	7	2	4	1
Prevention – General	52	102	94	121	120	171	155	179
O.H.S. (Bill 14)	20	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Section 39(1) Employer Relief of Costs	2967	2355	2286	942	151	131	387	219
Criminal Injuries	65	84	83	44	32	46	12	6
Section 47(2) Employer Charged with Costs	34	17	22	42	20	14	16	19
Assessments	73	53	61	66	201	110	118	85
Ombudsman (Reconsideration)	0	1	0	0	0	1	1	26
Section 10(8) Transfer of Claim Costs	6	10	1	10	8	11	5	10
Section 11 Certificates for Legal Action	112	85	78	78	55	74	84	86
Reconsideration Section 96.1	49	36	50	43	59	93	69	64
Reconsideration Section 96(2)	1	4	8	2	13	7	15	34
Extension of Time	234	268	235	219	184	*	*	31
Miscellaneous	0	0	0	0	0	0	1	26
TOTAL	***5249***	***4764***	***4511***	***3056***	***2325***	***1860***	***2296***	***1992***

* *Extension of time applications were included in the figures for each matter type in 1993 and 1994.*

The Appeal Division received more new matters in 1999 than any other year in the nine years of the Appeal Division's existence. The 5249 new matters in 1999 represent a 10% increase in new matters compared to the number received in 1998 (4764) which, in turn, was itself a 6% increase in new matters from those received in 1997 (4511). The number of new matters received in 1999 represents a 72% increase if compared to the number of new matters received in 1996 (3056), and a 126% increase if compared to the number of new matters received in 1995 (2325).

The primary explanation for the increase in 1999 compared to 1998 is the 26% increase over 1998 in employer appeals for relief of claims costs under section 39(1)(e). The Appeal Division also experienced in 1999 a small increase in employer assessment appeals, appeals under section 47(2) by employers charged with claim costs, requests for section 11 determinations and requests for reconsideration of Appeal Division decisions. A small decrease in appeals occurred in 1999 compared to 1998 for appeals from Review Board findings, requests for an extension of time to appeal, matters under the Criminal Injury Compensation Act, and employer prevention penalty appeals.

Regarding the significant increase in employer appeals for relief of costs under section 39(1)(e), the number of such appeals has significantly increased in each year since the second-half of 1996. During the five years from the inception of the Appeal Division in June, 1991 to June, 1996, the Appeal Division received 953 appeals under section 39(1)(e). This contrasts with the 8485 such appeals received during the three and one-half years from July 1, 1996 to the end of 1999.

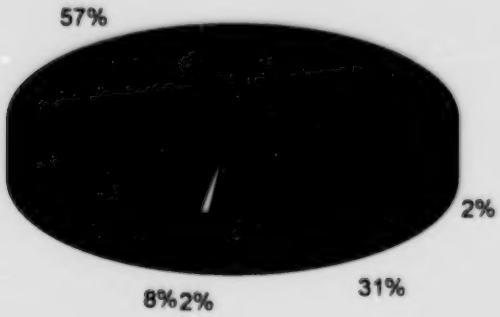
The dramatic change in the number of such appeals can be traced to the June 11, 1996 resolution of the Panel of Administrators which implemented recommendations of the provincial Information and Privacy Commissioner, effective July 1, 1996. One recommendation was that employers not receive full disclosure of workers' claims files until an appeal has been filed. Prior to the change of policy, employers were provided full disclosure of claim files once an appealable decision was made. With the change of policy, an employer must first initiate an appeal before full disclosure is provided.

The vast majority of such appeals in 1997, 1998 and 1999 were withdrawn before an Appeal Division panel was required to rule on the appeal. Of the 5455 employer relief of claim costs appeals dealt with by the Appeal Division during 1997, 1998 and 1999, over 5100 (94%) such appeals were withdrawn prior to an Appeal Division panel having to adjudicate on the appeal. The high number of withdrawals of such appeals suggests that the adjudicative function of the Appeal Division will not be unduly taxed by the volume of such appeals. Nevertheless, the processing of such appeals by the administrative staff of the Appeal Division represents a significant allocation of resources.

(b) Requests for an extension of time to appeal

In 1999, 234 applications were received for an extension of the 30 day time limit for appealing to the Appeal Division.

EXTENSION OF TIME REQUESTS BY TYPE



Review Board s.91	133	57%
OSH/Prevention	5	2%
Employer Relief of Costs	72	31%
Employers Charged with Costs section 47(2)	5	2%
Assessments	19	8%
Total	**234**	**100%**

The number of extension of time requests in 1999 represents a 13% decrease from the number of such requests received in 1998 (268). The number of such requests in 1999, however, is generally consistent with the number of those received in 1997 (235) and 1996 (219).

(c) Review Board appeals

During 1999 the Appeal Division received 1630 appeals from Review Board findings, a monthly average of approximately 136. This represents a 7% decrease from the number of such appeals received by the Appeal Division in 1998.

The 1630 appeals from Review Board findings represent 15% of the total number of Review Board decisions (panel findings and summary decisions) in 1999. This is consistent with the range of total Review Board decisions received by the Appeal Division in 1998 (16%), 1997 (14%) and 1996 (15%). The percentage remained in the range of 17% to 21% from 1993 to 1995.

(d) Employers' appeals or applications

3470 of the new matters initiated to the Appeal Division in 1999 were brought by employers.

Employer appeals or applications in 1999 by type

Type	*Number*
Employer appeals of Review Board findings	194
Prevention appeals	52
O.H.S. (Bill 14)	20
Employer relief of costs appeals	2967
Employer charged with costs - Section 47(2) appeals	34
Assessment appeals	73
Transfer of claim costs Section 10(8) appeals	6
Reconsideration applications	11
Extension of time requests	113
Total	***3470***

Employers' appeals or applications in 1998 totaled 2800 which was comprised of: 158 appeals of Review Board findings; 102 prevention appeals; 2355 relief of costs appeals; 17 appeals by employers charged with costs; 53 assessment appeals; 10 section 10(8) application; 10 reconsideration applications; and 95 extension of time requests.

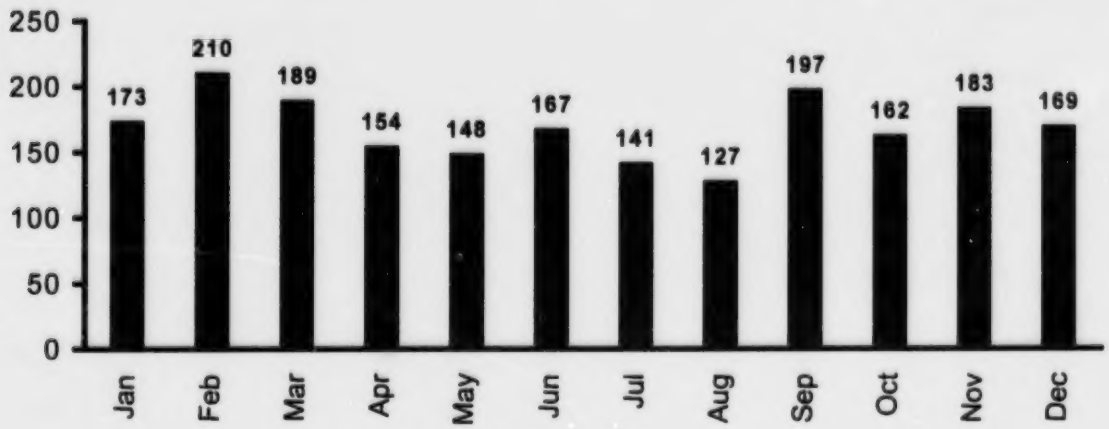
7. DECISIONS OF THE APPEAL DIVISION

(a) General

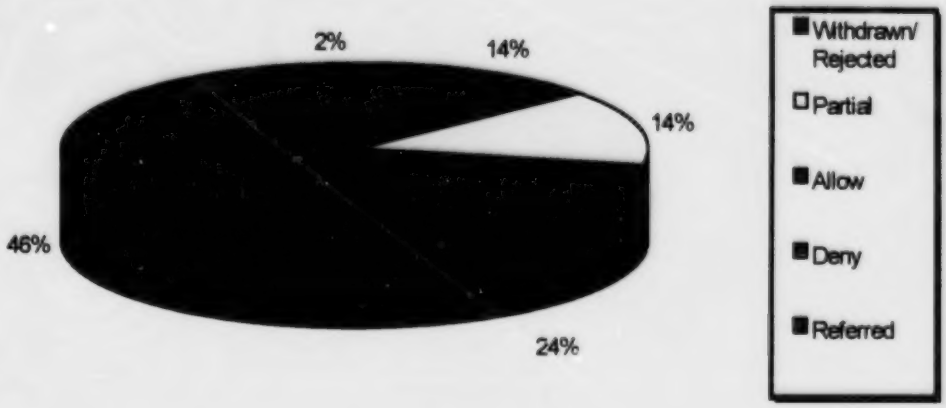
There were 2020 decisions rendered by the Appeal Division in 1999, an average of 168 per month. This was close to the record 2035 decisions made by the Appeal Division in 1998 (average of 170 per month). The annual average number of decisions issued each year from 1992 to 1997 was 1781 (148 per month).

In addition to the 2020 decisions in 1999, there were 1717 cases which were withdrawn or rejected on a preliminary basis, and 233 cases where the matter was withdrawn to facilitate other action outside the Appeal Division. In total, therefore, there were 3970 cases dealt with during 1999.

DECISIONS OF THE APPEAL DIVISION BY MONTH



(b) Appeals from Review Board findings

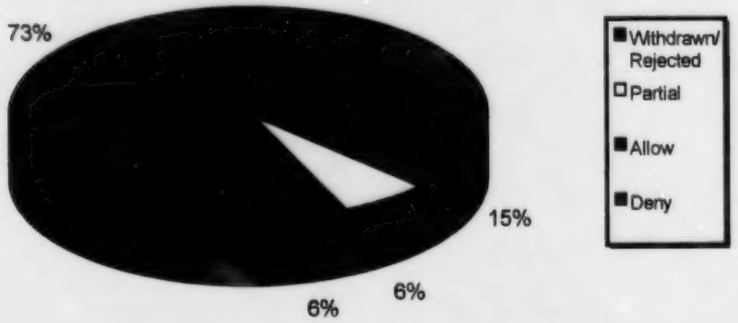


Disposition	Number	Percentage
Withdrawn/Rejected	229	14
Decisions (1374)		
Partial	228	14
Allow	388	24
Deny	737	46
Referred	21	2
Total	***1603***	***100***

Pending at the end of 1998	902
New applications in 1999	*1639
Total for consideration	2541
Total completions (withdrawals and decisions)	1603
Pending as of December 31, 1999	953

* includes adjustment from 1997 and 1998 annual reports and six (6) appeals recommenced following reconsideration decisions voiding the original Appeal Division decisions.

(c) Prevention

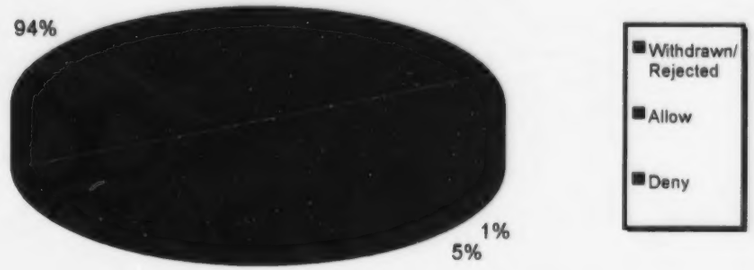


Disposition	Number	Percentage
Withdrawn/Rejected	14	15
Decisions (81)		
Partial	6	6
Allow	6	6
Deny	69	73
Total	***95***	***100***

Pending at the end of 1998	59
New applications in 1999	*53
Total for consideration	112
Total completions (withdrawals and decisions)	95
Pending as of December 31, 1999	17

* includes adjustment from 1997 annual report.

(d) Relief of claim costs (under section 39, and for experience rating purposes



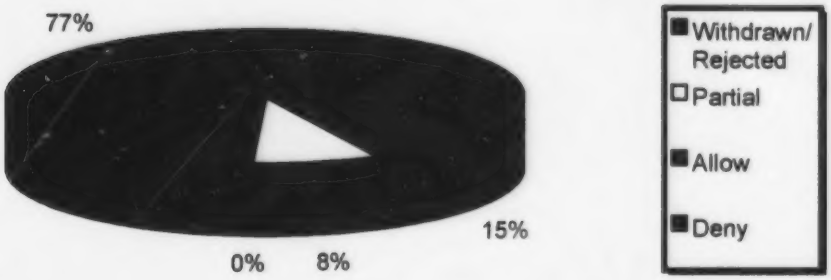
under section 42)

Disposition	Number	Percentage
Withdrawn/Rejected	1594	94
Decisions (108)		
Partial	4	0
Allow	17	1
Deny	87	5
Total	***1702***	***100***

Pending at the end of 1998	1307
New applications in 1999	*2987
Total for consideration	4294
Total completions (withdrawals and decisions)	1702
Pending as of December 31, 1999	2590

* includes adjustment from 1997 and 1998 annual reports and one appeal recommenced following a reconsideration decision voiding the original Appeal Division decision.

(e) Appeals by unregistered employer charged with claim costs under section 47(2)

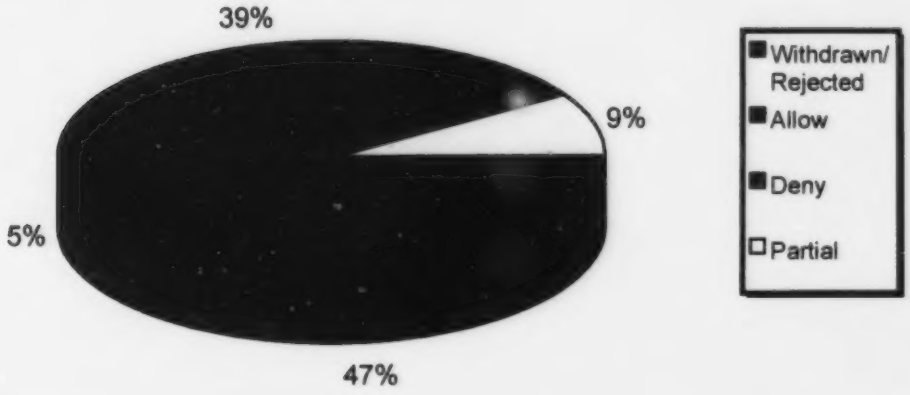


Disposition	Number	Percentage
Withdrawn/Rejected	4	15
Decisions (22)		
Partial	2	8
Allow	0	0
Deny	20	77
Total	***26***	***100***

Pending at the end of 1998	13
New applications in 1999	*33
Total for consideration	46
Total completions (withdrawals and decisions)	26
Pending as of December 31, 1999	20

* Includes adjustment related to 1998 figures.

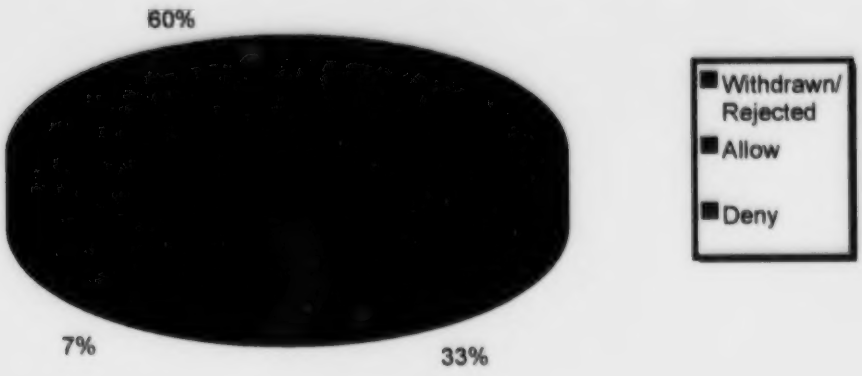
(f) Assessment appeals



Disposition	*Number*	*Percentage*
Withdrawn/Rejected	30	47
Decisions (34)		
Partial	6	9
Allow	3	5
Deny	25	39
Total	***64***	***100***

Pending at the end of 1998	28
New applications in 1999	73
Total for consideration	101
Total completions (withdrawals and decisions)	64
Pending as of December 31, 1999	37

(g) Transfer of claim cost – section 10(8)



Disposition	***Number***	***Percentage***
Withdrawn/Rejected	5	33
Decisions (10)		
Allow	1	7
Deny	9	60
Total	***15***	***100***

Pending at the end of 1998	10
New applications in 1999	6
Total for consideration	16
Total completions (withdrawals and decisions)	15
Pending as of December 31, 1999	1

(h) Section 11 certificates for legal actions

The Appeal Division rendered 49 decisions during 1999 on applications under section 11 of the Workers Compensation Act for a certificate for filing in a legal action. Written reasons were provided by the Appeal Division for each decision rendered, together with a certificate for filing in the Supreme Court of British Columbia (except in one case where the Appeal Division panel determined it lacked jurisdiction to issue a section 11 determination).

Pending at the end of 1998	86
New applications in 1999	112
Total for consideration	198
Total completions Withdrawals (23) Decisions (49)	72
Pending as of December 31, 1999	126

In 1998, the Appeal Division made 53 decisions on section 11 applications, 41 in 1997, 53 in 1996, 41 in 1995, and 39 in 1994.

(i) Criminal Injury Compensation Act

The Appeal Division issued 97 decisions in 1999 on review applications under the Criminal Injury Compensation Act. Written reasons were provided in each case. Leave was granted in 22 cases and denied in 44 cases. Twenty-eight decisions were made after a review on the merits, resulting in 17 applications allowed, 9 denied, and 2 partially allowed. In addition, 3 decisions were made on applications for reconsideration of an Appeal Division decision. The applications were denied in each case.

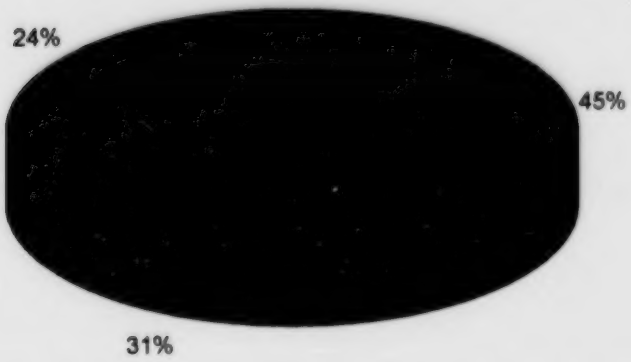
The Appeal Division issued 77 decisions in 1998, 51 decisions in 1997, 40 decisions in 1996, and 29 decisions in 1995, on review applications under the Criminal Injury Compensation Act.

(j) Preliminary dispositions

The Appeal Division issued written reasons on 195 preliminary matters in 1999. These 195 decisions on preliminary matters included 185 decisions on applications for extension of time to appeal.

The following chart represents the results on applications for an extension of time to appeal in 1999. As noted in the chart, there were 57 withdrawals of requests for an extension of time in 1999.

APPLICATIONS FOR AN EXTENSION OF TIME TO APPEAL: OUTCOMES IN 1999



■	Allowed	110	45%
■	Denied	75	31%
■	Withdrawn	57	24%
	Total	**242**	**100%**

The 185 extension of time to appeal decisions are noted in the following table according to the type of matter to which the decision relates and outcomes of those decisions:

Type of Matter	*Allow*	*Deny*	*Total*
Section 91(1) appeals	86	46	**132**
Prevention	3	2	**5**
Employer relief of claim costs	16	17	**33**
Employer charged with costs	2	0	**2**
Assessments	3	10	**13**
Total	***110***	***75***	***185***

(k) Reconsideration applications

(i) General

Forty-three reconsideration decisions were issued by the Appeal Division during 1999. Five concerned decisions of the former commissioners, and 36 concerned Appeal Division decisions. Two decisions concerned reconsideration requests in relation to both an Appeal Division decision and a decision of the former commissioners.

DECISIONS RENDERED ON APPLICATIONS FOR RECONSIDERATION, BY YEAR

Year	*Former Commissioners' Decisions*	*Appeal Division Decisions*
1992	56	15
1993	29	29
1994	16	55
1995	12	49
1996	11	44
1997	9	48
1998	5	44
1999	7	38

(ii) Decisions of the former commissioners

During 1999, seven applications for reconsideration of decisions of the former commissioners were considered.

Six of these applications were made on behalf of workers. One application was initiated by the estate of a worker's widow.

Four applications were made on the basis of new evidence. In one of the four cases the preliminary requirements for obtaining reconsideration were found to have been met.

Five applications contained arguments that decisions of the former commissioners involved an error of law. None of these arguments were successful.

In total, one of the seven applications for reconsideration was allowed.

(iii) Appeal Division decisions

During 1999, 38 applications for reconsideration of Appeal Division decisions were considered.

Seven applications were made on the basis of new evidence not previously available, and 21 applications were made on the basis of common law grounds (primarily error of law going to jurisdiction, including a breach of the rules of natural justice). These common law grounds were described in Appeal Division decision #93-0740 (10 WCR 127). Ten applications were made on the basis of both new evidence and common law grounds.

New evidence

Of the 17 applications for reconsideration of an Appeal Division decision on the basis of new evidence under section 96.1, two were found to have met the preliminary requirements for obtaining reconsideration.

Error of law going to jurisdiction

Ten cases were allowed of the 31 applications for reconsideration involving an allegation of error of law going to jurisdiction. The following is a brief summary of these successful reconsideration applications in 1999.

(a) Breach of the rules of natural justice

- Appeal Division Decision #99-0003 (4 January 1999)

The reconsideration panel concluded that the worker would likely be taken by surprise by the original Appeal Division panel's consideration of a question of the worker's disablement from work, since neither the claims adjudicator nor the Review Board panel addressed this question. The original panel, by making a finding on the issue of the worker's disablement from work, breached the principle of natural justice that parties affected by a decision ought to be notified of the main issues on the table so as to permit them to make representations on those issues. Therefore, the original panel committed an error of law going to jurisdiction.

- Appeal Division Decision #99-0382 (26 February 1999)

The reconsideration panel determined that the worker had been denied a fair hearing by the Appeal Division when a submission from the worker was not, through inadvertence, placed on the worker's claim file for consideration by the panel.

- Appeal Division Decision #99-1541 (7 October 1999)

The employer appealed a claims adjudicator's decision denying relief of costs under section 39(1)(e) of the Act. Subsequent to the employer's submission to the Appeal Division, the Panel of Administrators passed a resolution relevant to the issue before the Appeal Division panel. The resolution was not made available to the employer's representative prior to the issuance of the Appeal Division's decision. The reconsideration panel determined that the

original Appeal Division decision resulted in a denial of natural justice because the employer was neither made aware of the resolution nor given an opportunity to make a submission concerning its effect.

- Appeal Division Decision #99-1805 (26 November 1999)

The original Appeal Division decision dealt with an issue of whether the worker's wage loss benefits were correctly suspended on a particular date. A medical report relevant to this issue was received in the Appeal Division after submissions had closed. The reconsideration panel considered that it was likely that doctor's report was not brought to the attention of the original panel or was not reviewed by the panel for some other reason. The possibility that the panel did not see the report raises the question of whether there was an error of law going to jurisdiction in the original panel's decision. Such an error may occur when a panel fails to take a relevant consideration into account or disregards important information without explanation. Since there is no indication in the original decision that the panel considered the effect, if any, of the doctor's report, the reconsideration panel found the original decision must be set aside.

- Appeal Division Decision #99-1806 (26 November 1999)

The original Appeal Division panel denied the worker's request for an extension of time on the basis that the original panel believed the worker obtained the Review Board findings two months prior to telephoning the Appeal Division expressing an intent to appeal the decision. The reconsideration panel noted, however, that the Review Board findings were not successfully mailed to the worker until less than 30 days before the worker telephoned the Appeal Division. The reconsideration panel stated that, since this fact was either overlooked by the original panel or disregarded, the original panel's decision was based on an error of law going to jurisdiction.

(b) Not considering an issue

- Appeal Division Decision #99-0287 (17 February 1999)

The original Appeal Division panel's decision only dealt with a worker's entitlement to medical aid benefits and not his entitlement to wage loss benefits. The worker's representative had placed the specific issues of the worker's entitlement to time loss benefits and to medical aid before the original panel and the original panel had addressed itself to the worker's entitlement to medical aid. The reconsideration panel concluded that the panel missed the issue of wage loss benefits.

- Appeal Division Decision #99-0315 (23 February 1999)

The reconsideration panel concluded the original Appeal Division panel did not consider a specific issue which had been addressed in the Review Board finding under appeal and which was identified as an issue in the worker's Notice of Appeal. There was no unequivocal statement by the worker or his adviser before the Appeal Division that the worker was no longer objecting to the Board's decision on that issue. The reconsideration panel directed that the Appeal Division consider this as a missed issue.

(c) Improper reliance on evidence

- Appeal Division Decision #99-0578 (7 April 1999)

A reconsideration panel concluded that the original Appeal Division panel was wrong to rely on the narrative report of a Medical Review Panel to conclude that the Medical Review Panel had addressed the causal significance of the worker's specific compensable injuries. The narrative report cannot be used to remedy patent deficiencies in a certificate. The Act does not contemplate using narrative reports to remedy such deficiencies. To that extent, the reconsideration panel determined that the original panel's decision involved a jurisdictional error. The reconsideration panel therefore granted the worker's request and set aside the original Appeal Division decision regarding

whether there should be some expressed terms in the Medical Review Panel certificate as to the nature of the relationship between the worker's compensable disability and his specific compensable injuries.

(d) Patently unreasonable finding

- Appeal Division Decision #99-1500 (30 September 1999)

A reconsideration panel concluded that, under either of two possible interpretations of the original Appeal Division decision with respect to the interpretation of a Medical Review Panel certificate, the original decision was patently unreasonable on its face. The reconsideration panel noted that while a worker can cease to be disabled as of a particular date, it does not necessarily follow that the worker ceased to experience back pain as of that date. This distinction can be significant in cases, such as the present, where the worker argued that a psychological condition (i.e. pain disorder) was caused by the work accident. The original Appeal Division decision fails to distinguish between disability and pain. One interpretation of the original panel's decision appears to treat a Medical Review Panel statement concerning the worker's disability as having a bearing on the duration of the pain the worker experienced as a result of the compensable disability. However, the reconsideration panel notes, there are no binding statements in the Medical Review Panel certificate regarding the duration of the worker's pain. The other interpretation of the original panel's decision results in the conclusion that the original panel failed to consider the duration of the pain the worker experienced as a result of the compensable injury. On either basis, the original panel's decision was patently unreasonable and set aside.

- Appeal Division Decision #99-1585 (20 October 1999)

The original Appeal Division panel misapprehended evidence before it when it wrongly stated that the worker's net commission income for 1996 was $2,213 per month, rather than the correct figure of $2,213 *per annum*. The reconsideration panel determined that the evidence

concerning the worker's 1996 net commission income was central to the original panel's decision. Therefore, the original panel's decision was found to be based on an error of law going to jurisdiction and was set aside.

(l) Section 96(4) referrals

Under section 96(4) the president has authority, within 30 days of a finding of the Review Board, to refer the finding to the Appeal Division for redetermination on grounds of error of law or contravention of a published policy of the governors.

In considering referrals by the president under section 96(4), the Appeal Division is fulfilling its responsibility under the Act to provide interpretive guidance to the workers' compensation system.

During 1999, the Appeal Division received six section 96(4) referrals of Review Board findings by the president. This compares to four in 1998, three in 1997, and seven in both 1996 and 1995, two in 1994, and four in 1993. The Appeal Division rendered a decision on the merits of six referrals in 1999 (three of which were in relation to referrals made in 1998). Three referrals remained before the Appeal Division at year-end.

- **"Suspension" of benefits – lawfulness of item #22.14 of the Rehabilitation Services and Claims Manual**
  Appeal Division decision #99-0734 (3 May 1999)

  The worker underwent non-compensable neck surgery in August, 1993. At the time the worker had been receiving wage loss benefits. These benefits were suspended from the date of the neck surgery to April 1994, pursuant to item #22.14 of the Rehabilitation Services and Claims Manual. That item provides, among other things, that when a worker undergoes non-compensable surgery prior to the worker's recovery from a compensable injury, and there is a consequential delay in such recovery, the adjudicator may terminate benefits and recommence them when the worker's recovery is at the same stage as it was immediately prior to the surgery.

The two-person Review Board panel concluded the option of suspending benefits and then recommencing them is contrary to the Act. Sections 29 and 30 of the Act, the panel said, state that benefits are paid so long as the disability lasts. The panel stated no provision in the Act provides for terminating benefits while a compensable disability exists merely because a non-compensable disability occurs.

The Review Board finding was referred to the Appeal Division for redetermination pursuant to section 96(4) of the Act.

The three-person non-representational Appeal Division panel unanimously agreed that the Review Board erred in finding the policy at #22.14 contrary to the Act. Item #22.14 is better interpreted as involving a determination of the worker's entitlement under the Act than as involving the suspension of an entitlement. To the extent the worker's entitlement is limited, it is limited by the terms of the entitlement provision of the Act whereby compensation is payable only for disability which is caused by the work injury or disease. Item #22.14 is consistent with a broad purpose of the Act, which is to provide compensation for workers disabled from working by a compensable injury or disease. Item #22.14 involves a termination of compensation for a period of time while the worker remains disabled by a non-compensable cause. The option from item #22.14 applied in this case was not contrary to law. The panel considered that the worker's surgery likely caused a delay in recovery or an aggravation of his condition, which warranted the termination of benefits in this case.

- **Whether policy unlawful which provides that an independent operator who obtained personal optional protection (POP) is not entitled to listed statutory minimums**
  Appeal Division decision #99-1232 (17 August 1999)

  A Review Board panel majority determined that portions of policy items #40.11 and #66.20 of the Rehabilitation Services and Claims Manual were invalid as being contrary to the Act. The Review Board panel majority therefore found that an independent operator who purchased POP was entitled to the minimum compensation levels established in sections 22 and 29 of the Act, even though he purchased POP at a basic level that, according to Board policy, was not sufficient to entitle him to those minimum benefits.

  The Review Board panel majority determined that sections 3(3), 3(4) and 1(f) of the Act meant the applicant was entitled to the same compensation as would be provided to a worker under the Act and that included the minimum compensation figures found in sections 22(3) and 29(2).

  The Appeal Division panel noted that section 96(4) permits redetermination on the grounds of a contravention of published policy. The panel noted the Review Board panel majority was frank in contravening published policy in items #40.11 and #66.20. The Appeal Division panel then stated the issue in a section 96(4) referral is not simply whether the Review Board contravened published policy, but whether they were correct in doing so.

  The Appeal Division panel found that the Act permits the Board to issue policy found at item #66.20. The Appeal Division panel interpreted section 3(4) as meaning, in part, that admissions under section 3 may be made subject to the terms and conditions the Board considers adequate and proper. This empowers the Board to attach very broad conditions to the power to admit independent operators. The panel concluded

that it does not conflict with subsection 3(3) to interpret subsection 3(4) as permitting the Board to determine whether applicants for POP receive the benefit of subsections 22(2) and 29(2) and other minimums listed in item #66.20.

- **Use of ARCON software in conducting PFI examinations**
  Appeal Division decision #99-1252 (20 August 1999)

  The Review Board considered an appeal by the worker regarding a decision advising the worker of his disability entitlement. The worker had been evaluated for permanent disability assessment using ARCON on May 7, 1998. The Review Board panel stated that although the Board had adopted a practice of using the ARCON assessment on some claims, it was that panel's understanding the Board's Panel of Administrators had not made this a policy. The Review Board panel concluded the worker was therefore entitled to have his disability assessed by standard protocol. The issue on this section 96(4) referral was whether the ARCON assessment technique was authorized by Board policy.

  The Appeal Division panel noted a December 1997 resolution by the Panel of Administrators which establishes ARCON examinations for permanent functional impairment as an exception to policy set out in the Rehabilitation Services and Claims Manual. The Panel's resolution is a published policy and therefore the Review Board finding contravened a published policy. The Review Board finding was set aside and redetermined in a separate decision (#99-1253) on the same date on the worker's appeal of the Review Board finding.

- **Whether denying referral to a pain management program is a "medical decision" that is subject to appeal to a Medical Review Panel**
  Appeal Division decision #99-1350 (10 September 1999).

  An October, 1996 decision of the Appeal Division denied the worker's request for further treatment at a pain clinic. The worker sought to appeal this decision to a Medical Review Panel. A medical appeals officer denied the worker's request for examination by a Medical Review Panel on the basis that a decision to deny referral to a pain management program is not a medical issue and therefore cannot be referred to or resolved by a Medical Review Panel. The Appeal Division panel noted that the current practice of the Board is not to permit questions pertaining to medical treatment to be appealed to a Medical Review Panel. Until May, 1995 a published governors' policy provided that a "decision authorizing or declining to authorize a particular item of medical treatment is not a "medical decision" for the purposes of an appeal to a medical review panel".

  The Review Board panel, in allowing the appeal from the Board officer decision, stated that the question in this case was whether the worker would benefit from further medical treatment. Medical expertise is relied upon to resolve the question. The Review Board panel therefore concluded that the decision regarding reference to a pain clinic was a medical decision appealable to a Medical Review Panel.

  The Appeal Division panel concluded that, taking into account the history behind s. 96(4), Review Board findings may be redetermined where the Appeal Division concludes that they involve any error of law - be it a simple error or a patently unreasonable error.

  The panel then indicated that the question before it was whether the Review Board correctly interpreted the Act when it found that a worker is entitled to be examined by a Medical Review Panel if the worker is aggrieved by a decision

concerning medical treatment. The panel considered the relevant statutory provisions and policies and stated that there are several arguments why the Review Board's interpretation underlying its finding was viable and defensible. The strongest of these arguments is based on the very nature of section 58(3), which entitles a worker to be examined by a Medical Review Panel if aggrieved by a medical finding or decision.

The Appeal Division panel noted, however, that it is precisely this line of reasoning that was dismissed in an earlier published Appeal Division decision, Decision #93-0389, 9 WCR 361. Decision #93-0389 is specifically cited in the policy at #103.42 of the Rehabilitation Services and Claims Manual as constituting a full explanation of the Board's position that decisions on relief of costs applications under section 39(1)(e) are not appealable to a Medical Review Panel. Because the Act is ambiguous as to the precise scope of Medical Review Panel certificates and as to the range of matters that may be appealed to Medical Review Panels, the panel therefore examined the legislative history to determine the scope of section 58(3).

In light of that history, the panel concluded the proper interpretation of the provisions concerning Medical Review Panels is that they do not permit workers to appeal questions of medical treatment to Medical Review Panels. Consequently, the panel found that the Review Board finding involved an error of law.

- **Payment of wage-loss for day of injury**
  Appeal Division decision #99-1746 (17 November 1999)

The Review Board finding at issue provided the worker with wage loss benefits for the date of injury. Section 5(2) of the Workers Compensation Act states, in part, that "compensation is payable . . . from the first working day following the day of the injury". Item #34.30 of the Rehabilitation Services and Claims

Manual states compensation will begin the next shift after the worker is injured.

The Appeal Division panel inferred that the Review Board's statement of entitlement which included the date of injury was likely a typographical error. The Review Board panel made no comment on their intention to depart from the provisions of section 5(2), and provided no reasons for departing from policy. In any event, the Appeal Division panel concluded the Review Board finding contained an error of law and contravention of policy within the meaning of section 96(4). There is no provision in the Act or policy to pay wage loss for the date of injury. The finding that wage loss be paid for the date of injury was set aside by the Appeal Division panel.

- **Widows' benefits and foster mothers**
  Appeal Division decision #99-1909 (10 December 1999)

The appellant (Ms. X) before the Review Board was the spouse of a worker who died in a work accident in 1958. Ms. X commenced living with the worker in 1943. She had earlier been abandoned by her previous husband but no divorce was obtained. Ms. X and the worker had three children. They also raised two children from Ms. X's marriage. A 1958 letter from a Board solicitor indicated it would not appear Ms. X came within the definition of a common-law wife as she had a husband living. Board commissioners of the day instead decided that Ms. X would be awarded compensation as a foster-mother. Ms. X's pension as a foster-mother ended in 1965 when she was living with another man who she planned to marry. The pension for the youngest child was paid until 1968. In 1997 a Board claims coordinator advised Ms. X that reinstatement of the pension benefit would not be possible since benefits awarded as a foster parent were payable only so long as a child was considered to be dependent. Ms. X was also informed that the benefits paid to foster-mothers related to their status as foster-mothers and not to any entitlement as widows. Ms. X

was informed that the amendments to the Act providing for reinstatement of pensions to widows and common law wives who lost them on remarriage, and the extension of benefits to an additional group of widows and common law wives as a result of the British Columbia Supreme Court decision in Grigg (1996), had no application to foster mothers.

The Review Board allowed Ms. X's appeal. The Review Board concluded it had jurisdiction to treat the matter as an appeal from the 1958 decision to award compensation as a foster-mother rather than a common law spouse. The Review Board concluded Ms. X was a common law wife of the worker and entitled to benefits as a widow. The Review Board panel therefore concluded Ms. X was entitled to have her entitlement to reinstatement of her widow's benefit reconsidered by the Board.

The Appeal Division panel concluded the Review Board erred by assuming jurisdiction over the 1958 decision of the former commissioners. The Review Board finding which purports to address whether Ms. X should have been compensated as a common-law wife, rather than as a foster mother, is consequently a nullity. *Decision #8 of the Governors*, 7 WCR 171, means that only the Appeal Division has the ability to reconsider decisions of the former commissioners. The 1997 claims coordinator did not have jurisdiction to assess whether initially Ms. X should have been paid as a common law wife.

The Appeal Division panel then proceeded to redetermine the question of Ms. X's eligibility to reinstatement of the pension paid to her following the death of the worker. The Appeal Division panel concluded the foster-mother benefits could not have been payable past 1968 which is when the youngest child turned 18 years of age. Thus, even without entry into a common-law relationship, Ms. X would not have been entitled to a foster-mother's pension after that time, let alone in 1985 when section 15 of the Canadian Charter of Rights and Freedoms came into effect.

After the Appeal Division decision in this case was issued, counsel for Ms. X informed the Appeal Division that she wishes to pursue an application for reconsideration of the 1958 decision by the former commissioners.

8. POLICY MATTERS

The following eighteen Appeal Division decisions were among the more significant decisions referred by the chief appeal commissioner or acting chief appeal commissioner to the attention of the Panel of Administrators in 1999.

- ***January 26, 1999 (Appeal Division decision #99-0126).***

  The director, Assessment Department, treated dividends totaling $36,000 as part of the employer's assessable payroll for 1997. The dividends had been paid to the spouse of the employer's president. The spouse, who was a shareholder and officer of the employer, also worked part-time for the employer. The spouse was not paid a salary in 1997, although in previous years the employer indicated she earned approximately $6,000 to $8,000 per year.

  The governors' policies concerning the determination of assessable payroll are contained in Part 4 of the Assessment Policy Manual which includes policy nos. 40:10:10 to 40:10:60. The Appeal Division panel noted the Assessment Department has interpreted policy no. 40:10:30 (Subject: Active Principals' Earnings) to mean that the full amount of the dividend should be assessed. There is nothing in the decision under appeal, the panel said, that indicates any consideration was given to including less than the full amount of the dividend. Regarding inclusion of dividends in assessable payroll, the panel stated that, given the broad wording of section 39(1) of the Act and the scheme of the Act, the policy does not contravene the Act by setting out that dividends are assessable even though dividends do not clearly fall within the definition of payroll.

  A question arises, the panel said, as to whether the entire amount of the dividend should be included in the assessment. The panel notes policy no. 40:10:30 indicates that "an evaluation for services is required" when there is no remuneration or nominal remuneration.

Policy no. 40:10:30 also indicates "the cash value of the dividend will be the basis for an evaluation" if dividends are "the sole method of remuneration". The panel stated the policy is confusing in this regard because "remuneration" is defined in the same policy item as a payment to a shareholder that is recorded as a business expense. The payment of dividends is the method of distributing the profits or retained earnings of a company to its shareholders; dividends are not recorded as a business expense. Therefore, the panel stated, dividends will never be a method of remuneration if the definition of remuneration in the early part of the policy item is used.

The policy goes on to say "[i]f the remuneration is considered nominal but dividends have been paid then the aggregate total of the remuneration and the cash value of dividends will be assessed as an evaluation". It is arguable, the panel said, that this statement and the examples that follow the policy indicate that the full amounts of the dividends will be assessed as payroll. However, the panel continued, this is inconsistent with the earlier statement that dividends will be a basis for an evaluation since the definition of evaluation indicates that an evaluation involves some process of estimating. The panel concluded by stating that if the policy was intended to indicate that the full amounts of dividends paid would be assessed, it would not have been necessary to state that there would be an evaluation.

Despite the ambiguities in policy no. 40:10:30 making interpretation difficult, the panel concluded it was not satisfied it was reasonable to interpret the policy to mean the full amounts of dividends paid are included for assessment purposes regardless of the amount of work a shareholder has done for the employer.

The panel allowed the appeal and directed that the file be returned to the Assessment Department for the evaluation of the services provided by the spouse.

This decision was brought to the Panel's attention to indicate the ambiguity in policy identified.

- ***May 12, 1999 (Appeal Division decision #99-0783).***

A worker's widow appealed a Review Board finding denying her dependants' benefits following the worker's death in 1983 for which a significant cause was lymphocytic lymphoma (non-Hodgkin's lymphoma). The Review Board panel concluded the lymphoma was not caused by his employment in a smelter. He had worked 19 years in the smelter to 1983 and had been diagnosed with non-Hodgkin's lymphoma in 1979. The widow had first written the Board in 1993 seeking information as to whether she was entitled to compensation benefits.

Subsection 55(2) provides that no compensation is payable for death from occupational disease unless an application is filed within one year of death. The provision states that subsection 55(3.2) is an exception to the general one-year rule. Item #32.58 (Newly Recognized Occupational Diseases) of the Rehabilitation Services and Claims Manual relates to subsection 55(3.2). That item states, among other things, that before the Board may consider paying compensation for a death due to an occupational disease, the application for compensation must be made within three years after the date the Board recognized the disease as an occupational disease for the worker's kind of employment.

The Appeal Division panel found that the application for compensation was not barred by section 55 of the Act since non-Hodgkin's lymphoma has not, to date, been recognized as an occupational disease by the Board.

The panel commented on its interpretation of subsection 55(3.2) and policy item #32.58. In the panel's view, the "date" that triggers the three year time limit is the date the Board determines that sufficient medical or scientific evidence is available for the Board to recognize the disease as an occupational disease. That is, the three-year time limit would begin when the Board recognizes a disease as an occupational disease.

The panel stated item #32.58 (Newly Recognized Occupational Diseases) interprets section 55 more broadly. The policy interprets subsection 55(3.2) as making reference to recognition of the disease as an "occupational disease for this worker's kind of employment". The panel stated that only Schedule B (and the one disease listed under Section 6(4)) list certain occupational diseases in relation to particular kinds of employment. Occupational diseases listed by regulation are not made in reference to a particular kind of employment. Thus, under the policy interpretation of section 55, the panel said, the time limit for filing an application for a death or disablement from an occupational disease is extended even for those diseases listed by regulation as "occupational diseases" as they are not recognized in reference to a particular kind of employment.

The panel concluded that this does not seem to be a viable interpretation of the Act. Section 55 refers to recognition of occupational diseases and does not mention recognition in relation to a particular employment. The panel concluded its reasons in this area by stating it would be helpful if the Panel of Administrators reviewed item #32.58 in light of the panel's comments.

The panel went on to declare non-Hodgkin's lymphoma as an occupational disease in this individual case, and that the worker's disease was due to the nature of his employment.

- ***May 25, 1999 (Appeal Division decisions #99-0830/31/32/33).***

The employer appealed four decisions of the Prevention Division for various violations of the regulations at a number of operating locations of the employer in the province. The penalties totaled $96,000.

The employer noted that in relation to a number of the penalties, the sanction review officer relied on prior violations, warning letters and penalty assessments from the employer's operations at other locations. The employer relied upon guidelines for imposing penalty assessments on multi-site employers contained in an unpublished

and undated document titled "Procedures for the Additional Assessment Review Process", a copy of which was obtained from the Prevention Division. The document states, among other things, that violations occurring at one of several locations of an employer will normally be considered as if that location was the employer's only location.

The Appeal Division panel noted that while a ground for appeal includes contravention of published policy, the procedures document relied upon by the employer does not constitute published policy of the governors or the Panel of Administrators. The panel stated it was unable to find any basis in the Act, the regulations or published policy to support the position that violations at one operating location will normally be considered without reference to the employer's compliance history at other locations for determining if a penalty assessment is appropriate.

The panel stated that the collective experience of an employer's separate operating locations provides significant evidence in determining whether the employer has met its obligations under the Act and the regulations.

The panel found that the compliance history of the employer provided substantial evidence that the employer repeatedly failed to ensure compliance at its operating locations. In the result, the panel rejected the employer's position that penalty considerations should be limited to the history of each operating location.

This decision was brought to the Panel's attention to indicate the absence of policy on the issue of prevention penalties for employer's with multiple work locations.

- ***June 30, 1999 (Appeal Division decision #99-1030).***

The employer appealed an assessment officer's decision denying the employer relief of costs on a claim involving a worker suffering from red cedar asthma.

Assessment Policy Manual item #30.50.52 provides, among other things, for exclusion of claims costs, for the purposes of the employer's experience rating, when the claim costs relate to an industrial disease listed in that policy item. Red cedar asthma had not been specifically included in the policy item list.

After analyzing the policy item and its history, the Appeal Division panel majority concluded that policy item #30.50.52 provided an exhaustive list of exclusions for those decision-makers in the system without policy-making authority. The panel denied the employer's appeal.

The panel majority also noted that the employer in the present case requested that red cedar asthma be added to the list of excluded diseases in policy item #30.50.52. The panel majority noted this was really a request for a change in policy. They stated it would be up to the Panel of Administrators in charge of the governors' functions to effect such a change — not up to a panel of the Appeal Division. The panel majority noted that in the context of a decision on a particular case, the Appeal Division can pronounce itself on the legality of a policy underlying the case before it. It can refer gaps or ambiguities in the policies to the Panel of Administrators' attention. But this is different, the panel majority stated, from making the type of policy change requested by the representative in this case.

That said, the panel majority recognized that it obtained a body of substantial evidence through the director of the Occupational Hygiene Program of the University of British Columbia, Health Care and Epidemiology, which supports the argument by the employer's representative that asthma caused by western red cedar meets the test in policy item #30:50:52. The panel majority indicated it would make this evidence available to the Panel of Administrators, as it may wish to consider revising its list of exclusions in policy item #30:50:52 in light of this evidence.

- ***August 27 and 29, 1999 (Appeal Division decisions #99-1281 and #99-1282).***

  Section 26 of the Criminal Injury Compensation Act states that the Act "applies for compensation claims arising from an injury or death resulting from an act or omission that occurs after July 1, 1972." The applicants in both cases challenged the constitutionality of this provision, arguing that the provision is discriminatory, and therefore contrary to section 15(1) of the Canadian Charter of Rights and Freedoms because it draws a distinction between an offence that occurred before July 1, 1972 and an offence that occurred after July 1, 1972.

  The Appeal Division panel concluded in both cases that applying the Charter to the respective applicants' cases would involve going back to redress an old event which took place before the Charter created the right sought to be vindicated. After analyzing relevant Supreme Court of Canada authority, the panel concluded that it is not permissible to apply the Charter to either applicant's case. The Charter may not be applied retroactively or retrospectively.

- ***September 17, 1999 (Appeal Division decision #99-1396).***

  The applicant for compensation under the Criminal Injury Compensation Act witnessed the murder of his girlfriend by her common law husband. The claim was for emotional and mental trauma. The applicant was not an "immediate family member" of the woman killed. His claim was denied. The issue before the Appeal Division was whether the applicant can validly claim compensation as a victim of crime by virtue of having witnessed a crime.

  The panel found that the Board has the power to award compensation to a witness of crime who is unrelated to the person against whom the crime was committed, if the Board is satisfied that the person has been injured within the meaning of the Act. In the absence of physical harm, that person must suffer from mental or nervous shock. Mental or nervous shock are not defined terms in the

Act. The panel noted there are no published governors' policies on what these terms mean. Common law cases referenced by the panel suggest that it would be reasonable to define these terms as involving a diagnosed illness. In the absence of published policies on the matter, the panel regarded this as a workable definition for the purpose of giving effect to the Act. The claim was referred back to the Board to determine whether the applicant suffered a mental or nervous shock within the parameters set out in this decision. If he did, the panel stated, he qualifies for compensation as a victim of crime.

This decision was brought to the Panel's attention regarding the absence of policy in criminal injury matters.

- ***September 22, 1999 (Appeal Division decision #99-1427).***

The widow's husband was a logger who was killed in a work-related accident. The benefit scheme in section 17(3)(c) to (e) of the Act distinguishes in relation to age between three categories of dependent widows and widowers. The widow was aged 40 at the relevant time. The widow argued that the scheme set out in section 17(3)(c) to (e) offends section 15 of the Canadian Charter or Rights and Freedoms because of the higher benefits it gives to surviving spouses who are 50 years of age or over at the date of the worker's death. In 1998, an Appeal Division decision (#98-0527, 14 WCR 114) concluded the scheme did not offend Charter section 15. While the Appeal Division panel was deliberating the 1998 case, the Supreme Court of Canada heard argument in an analogous case, Law v. Minister of Employment and Immigration. The court had not issued its decision before the Appeal Division panel issued decision #98-0527 on April 3, 1998. The court's decision was issued in March, 1999 concluding an analogous scheme under the Canada Pension Plan did not offend Charter section 15.

The panel in this case concluded the Supreme Court of Canada decision in Law has not undermined the reasoning which led the Appeal Division panel in Decision #98-0527 to conclude that the

scheme does not involve discrimination within the meaning of section 15 of the Charter. If anything, the panel stated, the Supreme Court of Canada decision buttresses the Appeal Division panel's reasoning. The widow's appeal was denied.

This decision was brought to the Panel's attention to inform them of decisions where provisions of the Act are challenged under the Charter of Rights and Freedoms. The Panel was informed in January, 2000 that since Decision #99-1427 was issued, the Appeal Division has decided 23 remaining similar appeals. The conclusion reached in those remaining cases regarding this Charter issue was consistent with the determination made by the Appeal Division panels in Decision #98-0527 and Decision #99-1427.

- ***September 23, 1999 (Appeal Division decision #99-1429).***

The father of an individual who was fatally shot in 1991 sought review of a decision by the Board's criminal injury section and an appeal committee which denied a claim for non-pecuniary damages for mental and emotional shock and psychological trauma. The father was told of the death on the afternoon it occurred. The person who shot the son had been convicted of criminal negligence causing death.

The father was provided compensation in the form of grief counseling. The father's application for $25,000 for pain and suffering under section 2(4)(f) of the Act was denied by the Board. Section 2(4) provides that compensation may be awarded for items (a) to (f). Item 2(4)(f) provides for "non-pecuniary loss or damage for pain, suffering, mental or emotional trauma, humiliation or inconvenience." Item 2(4)(c) provides for "pecuniary loss or damages incurred by immediate family members as a result of the victim's death". The Board's officer's decision indicated that the legislature did not amend section 2(4)(f) in 1995 when it added "immediate family member" to those able to claim compensation and so did not intend to expand the application of section 2(4)(f).

The Appeal Division panel majority concluded from the legislative history and the wording of the Act that an applicant, such as the father, cannot be both a "victim" and "an immediate family member". Since the father is clearly the immediate family member of the victim, any eligibility the father may have for compensation flows from that status and not as a "victim". Applying a purposive interpretation to section 2(4) and the Act, and relying on common law cases regarding damages for cases of intentional harm, the Appeal Division panel majority concluded the non-pecuniary compensation provided in section 2(4)(f) may be awarded to an immediate family member of a deceased victim of crime, regardless of whether they witnessed the crime. The panel majority also took guidance from the common law in determining guidelines for awarding non-pecuniary damages. The panel majority concluded an award of $5,000 for non-pecuniary loss under section 2(4)(f) was appropriate.

The panel minority concluded that under the Act a person may be eligible for compensation in more than one capacity and that the father's claim should have been referred back to the Board to determine whether he qualified for compensation for non-pecuniary loss as a victim in his own right. The panel minority also stated that it would be opportune for the Panel of Administrators to establish clear policy guidelines in respect of the compensation payable to immediate family members under section 2(4)(f) of the Act.

- ***October 28, 1999 (Appeal Division decision #99-1644).***

The worker suffered a compensable lower back and hip injury. The worker was limited in her ability to carry out most activities, particularly walking, sitting, bending or lifting. The worker is a widow without family assistance on a day-to-day basis. The Board initially paid a "home support service" to assist the worker. The Board's vocational rehabilitation consultant later terminated Board support for the service. In appealing that decision, the worker provided a doctor's opinion which stated that while the worker tries to be as active as possible, she is very disabled and unable to do the usual housework, yardwork, etc.

The panel determined the pertinent policy items from the Rehabilitation Services and Claims Manual are items #84A.00 and #90.00 (including #80.00 concerning personal care allowances or expenses and #81.00 concerning independence and home maintenance allowances). The Appeal Division panel's interpretation of item #84A.00 indicates that the item does not apply to the worker's situation. The panel concluded item #84A.00 is a policy directed to those situations where an injured worker is a parent with caregiving responsibilities for dependant children at home. The services contemplated in the item are intended to apply to primarily childcare services, with, perhaps, some housekeeping services rendered in conjunction with the childcare services. The Appeal Division panel further found that the worker did not qualify for a personal care allowance or an independence and home maintenance allowance.

The panel noted item #84A.00 of the Manual is easy to misinterpret because the wording is sometimes vague and archaic. The panel therefore recommended that the Panel of Administrators may wish to examine Item #84A.00 of the Manual together with the other policies in the Manual dealing with personal care and independence and home maintenance allowances. Such an examination should be made, the panel suggested, with a view to clarifying the language in these policies to ensure that they clearly express the Board's intent regarding responsibility for payment of the personal care, housekeeping, child care and home maintenance needs of an injured worker.

- ***November 28, 1998 (Appeal Division decision #98-1855); August 20, 1999 (Appeal Division decision #99-1250); August 20, 1999 (Appeal Division decision #99-1254); September 22, 1999 (Appeal Division decision #99-1426)***

These four decisions involved the following circumstances:

- A correctional officer who experienced disabling emotional distress after being ordered by his employer to investigate fellow officers. During the investigation the officer was exposed

to death threats, harassment, and the potential loss of the support of fellow officers in a crisis situation (#98-1855);

- A teacher who experienced a post-traumatic stress disorder following receipt of news that a student with whom she dealt had committed suicide (#99-1250);
- A manufacturing worker who stopped working due to acute symptoms of anxiety following sexual harassment by his supervisor (#99-1254);
- Another manufacturing worker, who worked with the same supervisor as the worker in decision #99-1254, was diagnosed as suffering from post-traumatic stress due to sexual harassment by the supervisor (#99-1426).

The panel in decision #98-1855 determined that psychological claims — at least those based on scientifically recognized diagnoses — come within the purview of the Act. There is no statutory requirement that they be caused by a physical stimulus nor is there a requirement that the stimulus — whether physical or mental — be sudden. The panel stated there is some ambiguity in governors' policies in this area. The panel recognized that the Board has interpreted the policies to mean that psychological impairment, if not accompanied by physical impairment, is only compensable if the psychological impairment was triggered by a traumatic event and, in such a case, it would be treated as an injury.

The panel in decision #98-1855 concluded that an interpretation of the term "trauma" under which the term would retain some meaning includes not only a situation involving one sudden/shocking stimulus but also situations involving a series of unusual incidents or an unusual pattern. By "unusual" the panel meant of significantly greater dimensions than the day-to-day tensions which all employees experience in their regular working day. Adoption of this criterion means that the distinction between sudden stimuli and gradual stimuli becomes somewhat irrelevant.

The panel in decision #98-1855 was of the opinion that situations which meet the "unusualness" criterion can be characterized as "traumatic", even where the stimuli operate gradually. The panel also

concluded that the existence of unusual stimuli or traumas must be objectively verifiable on the evidence. In addition, the panel adopted a two-step test from the Ontario workers' compensation appeal tribunal jurisprudence which states:

1. Is it plausible that workers of average mental stability would have perceived the workplace circumstances or events to be as mentally stressful as the injured worker perceived them to be?

2. If so, would such average workers be at risk of suffering a disabling mental reaction to such perceptions?

As the worker's claim was found to meet these stringent requirements in this case, the panel found it unnecessary to determine if less stringent tests were appropriate.

Two later Appeal Division decisions (#99-1250 and #99-1254) expressed reservations regarding the formulation of the two-step test. These latter panels stated that the test imposes a very high standard for determining that a stimulus — whether one event or a series of events — was unusual.

The panels in decisions #99-1250 and #99-1254 stated that in the case of a psychological injury it must be determined whether there were specific workplace events prior to the injury and whether these could have caused a psychological injury. The second part of this assessment, whether these events could have caused a psychological injury, requires an objective assessment of the nature of the workplace events or stimuli.

In the view of the panels in decisions #99-1250 and #99-1254, an interpretation of the term "traumatically induced" that is broad enough to include unusual stimuli occurring over a period of time in the workplace assists in reconciling the policies regarding psychological injuries with the legislation. An objective test for determining whether there were unusual stimuli is necessary in order to determine whether the stimuli could have had causative significance in the onset of a psychological condition.

If the test for assessing whether there were unusual stimuli is very high or difficult to meet then it may be considered unlawful because it goes beyond what is necessary to show work causation. In this regard, the later panels considered that the two step test proposed in decision #98-1855 may exceed what is required to determine the role of the employment in causing a psychological condition. It should be sufficient that the workplace circumstances or events were reasonably capable of causing psychological injury.

With regard to the second step in the test proposed by decision #98-1855, the later panels considered the requirement that average workers be at risk of suffering a disabling reaction is too stringent. There is no such requirement in connection with other injury claims.

Based on the discussion above, the three 1999 decisions utilized the following test for determining whether there was a compensable psychological injury:

- Did the workplace circumstances or events involve unusual stimuli?
- Were the workplace circumstances or events reasonably capable of causing psychological injury?
- If so, were the workplace circumstances or events of causative significance with respect to the worker's psychological injury for which compensation is sought?

In the four Appeal Division decisions cited above, the panels found that the workers' psychological symptoms involved compensable injuries which arose out of and in the course of employment.

This summary was provided to the Panel of Administrators for the purpose of keeping it informed of recent decisions by the Appeal Division concerning claims for psychological injuries or diseases.

- ***December 6, 1999 (Appeal Division decision #99-1868).***

The worker operated trucks, caterpillars, loaders and bulldozers for over 30 years. The Board concluded there was insufficient evidence to conclude that the worker had degenerative disease of the spine resulting from whole body vibration (WBV) exposure.

The literature indicates that significant correlations were found between WBV exposure and low back pain and disorders. Apparently, rather than causing a unique disorder, vibration accelerates the onset of currently recognizable syndromes (such as lumbago, spondylosis, and herniated discs). A report from the University of British Columbia concluded that epidemiological studies of the association between back disorders and vehicle operation jobs with vibration exposure show overwhelming evidence of a relationship that is consistent and strong, increases with increasing exposure, temporally follows exposures, and is biologically possible.

Regarding the worker in this case, the panel determined his back pain was caused by his degenerative disc disease. In the circumstances of this case, the panel concluded the evidence supports the conclusion that the worker's degenerative changes were at least significantly aggravated by his work exposure to WBV. Item #13.12 of the Rehabilitation Services and Claims Manual indicates that disability arising from exposure to vibration over time is considered to be a disease. The panel concluded the worker's claim should be adjudicated as a claim for an occupational disease. Degenerative disc disease is not included in Schedule B and has not been designated as an occupational disease by regulation. Policy at item #26.04 allows for recognition of a worker's condition as an occupational disease in his or her particular case.

The panel noted it was unable to give direction to the Board that science has established that whole body vibration work exposure has compensable consequences. The panel's analysis concerned whether in the present case there is a causal link between the worker's exposure to whole body vibration and his spinal pathology. The panel considered the evidence before it supports generally an

association between such exposure and back disorders and that there is a link in this worker's case. The panel noted that whether any causal connection should be codified in Schedule B is a matter for the Panel of Administrators to determine. The fact that, as counsel for the worker observed, the scientific evidence may only support WBV as a significant agent in the acceleration and aggravation of spinal pathology, rather than as the cause of spinal pathology, may be an important distinction when considering whether Schedule B should be amended in this regard.

This decision was brought to the Panel's attention in light of the panel's comments concerning possible changes to Schedule B.

9. PUBLICATION OF APPEAL DIVISION DECISIONS

Fifteen Appeal Division decisions issued in 1999 were forwarded for publication in the *Workers' Compensation Reporter.* In addition, twelve decisions from earlier years were forwarded for publication during 1999. In total, twenty-seven decisions were sent for publication.

Over the past eight years, 292 Appeal Division decisions have been published in the *Reporter* (to volume 15, no. 2). Appeal Division decisions published in the *Reporter* are also available on the internet at:

http://www.worksafebc.com/policy/appeals/default.asp.

Following are brief comments concerning the decisions forwarded for publication in 1999. These comments are intended to be descriptive only, to assist in locating relevant decisions.

- Proprietor Registered Without Personal Optional Protection — Coverage Denied
  #95-0185, 21 February 1995, 15 W.C.R. 133
  [Petition for judicial review dismissed, *Watford v. W.C.B.* (1999), 15 W.C.R. 305]

  The "no-fault" nature of the workers' compensation system refers to compensation to workers for work related injuries, regardless of who was at fault for the injury. It does not apply to people who are not "workers" under the Act. In the present case, the individual was not a "worker" under the Act and the Appeal Division panel did not accept that the "no fault" principle was intended to apply to independent operators who decide not to obtain personal coverage. That would be contrary to the language in sections 1 and 2 of the Act, which provides for the admission of independent operators on application.

- Travel to Regular Starting Point
  #97-0191, 10 February 1997, 15 W.C.R. 145

  The Appeal Division panel questioned whether the wording of item #18.32 of the Rehabilitation Services & Claims Manual supports the extension of workers' compensation coverage to workers going to

and from their employment, solely on the basis that they are traveling to an irregular starting point. To what extent does the journey have an employment purpose, rather than simply involving travel to work? Under governors' policy, the general proposition is that accidents occurring in the course of travel from the worker's home to the normal place of employment are not compensable. The policy recognizes an exception to this general position in relation to workers who are employed to travel (whether this is a normal part of the job or is exceptional).

- Defamation Action — No Jurisdiction Under Section 11
  #97-0829, 19 June 1997, 15 W.C.R. 165

  The preconditions for the Appeal Division issuing a section 11 determination in a civil court action were not met in this case. The civil court action instituted by the worker for alleged defamatory comments cannot be said to be based on a disability caused by an occupational disease, nor can it be said to be based on personal injury. The worker's alleged physical and emotional stress and injury are consequential to the cause of action which is defamation. The essential element of that cause of action is damage to reputation, which is neither an occupational disease nor a personal injury within the meaning of the Act. Because the action is based neither on a disability caused by occupational disease nor on personal injury (or death), the Board lacks the authority to proceed with the section 11 determination.

- Status of Foster Parents
  #98-0584, 15 April 1998, 15 W.C.R. 175

  An Appeal Division panel majority concluded the spouse of an individual who had contracted with the Ministry of Social Services to provide residential childcare, was an independent operator. If the spouse had an implied contract with the Ministry, the panel majority found that it was "a contract for services" and not a "contract of service". Therefore, since the spouse had not obtained personal optional protection, she was not a "worker" entitled to benefits under

the Act when she was a victim of a violent altercation with the child covered by the agreement with the Ministry.

- Accident Presumption — Section 5(4)
  #99-0473, 15 March 1999, 15 W.C.R. 301

  During the worker's dinner break, she was injured when she took the lid off food she had heated in a microwave oven at the workplace. The microwave had been purchased by the employees. Based on item #21.10 of the Rehabilitation Services & Claims Manual, the Appeal Division panel found that the employer's condonation of the introduction of the microwave into the workplace resulted in it becoming part of the premises. Item #19.30 of the Manual specifically states that coverage does not extend to injuries sustained by workers through eating their own food. A logical extension of the policy is that an injury in the course of a worker handling his or her own food would not be compensable. In addition, item #19.31 indicate that the property of a worker which causes an injury does not need to be intrinsically hazardous. Application of the policies led to the conclusion that the injury did not arise out of employment. The Appeal Division panel found that the presumption in section 5(4) had been rebutted.

- Accident Presumption — Section 5(4) — Unexplained Fall
  #99-0149, 29 January 1999, 15 W.C.R. 291

  The worker's unexplained fall at work may be characterized as involving an accident, therefore entitling the worker to the benefit of the presumption in section 5(4) that the fall "arose out of the employment, unless the contrary is shown". The Appeal Division panel concluded the medical evidence on file was not substantial enough to rebut that presumption on a balance of probabilities.

- Whether questions pertaining to medical treatment can be appealed to a Medical Review Panel
  #99-1350, 10 September 1999

  See summary of this decision under the Section 96(4) Referrals section [section 7(l)] of this Annual Report.

- Requirement for reasons in decision by Board officer —
  Section 96(6) and 96(6.1) appeals
  #97-1514, 18 November 1997

  A Board officer decision denied an employer's request for relief of costs under section 39(1)(e) with a decision which only stated section 39(1)(e) was not applicable to the case. The Appeal Division's jurisdiction on appeals from such decisions is limited to the grounds of an error of law or fact or contravention of a published policy of the governors. The Appeal Division panel noted that if the Board officer decision does not set out reasons for a decision, the employer cannot know the grounds on which to challenge the decision in the Appeal Division, and the Appeal Division has no basis on which to determine whether there was an error of fact or law or a contravention of published policy. The right of appeal which the legislature clearly intended the employer to have becomes illusory in the absence of sufficient reasons to review on appeal.

- Section 11 Determination —
  Whether Altercation Between Employees
  Arose in Course of Employment
  #98-0673, 1 May 1998

  In many circumstances, an aggressor will be viewed as having removed himself or herself from employment. Although the workers' compensation system is a "no-fault" system there is a great deal of difference between being negligent or careless, and being the aggressor in an assault. The act of the defendant in assaulting the plaintiff was so far beyond the scope of employment activity that the Appeal Division panel found the defendant had removed himself from his employment when the assault occurred.

- "Medical decisions" appealable to a Medical Review Panel
  #98-0691, 6 May 1998

  Based upon the legislative background and the provisions of the Act defining the jurisdiction of Medical Review Panels, decisions pertaining to the authorization of health care benefits are not appealable to a Medical Review Panel unless they also involve a

decision of the nature contemplated in section 61(1). In the present case, where the issue concerns whether a particular brand name of sunglasses for an eye injury is superior to any other for the relief of photophobia, this is an issue pertaining to the authorization of medical treatment which is not appealable to a Medical Review Panel.

- Retroactive Rehabilitation Benefits
  #98-1112, 15 July 1998

  In this reconsideration decision, an earlier Appeal Division decision was upheld which sanctioned the retroactive payment of vocational rehabilitation benefits. The original Appeal Division decision can be read as a decision that ascribes to the Board the authority to pay retroactive rehabilitation benefits, regardless of whether the worker was actually engaged in some rehabilitation process during the time period over which the benefits are found to be payable. The reconsideration panel noted that while the existence of this authority is likely controversial, the panel needed only to determine whether the original decision was patently unreasonable to assume the Board had such authority. The reconsideration panel concluded that the original panel's decision was viable in light of section 16 of the Act.

- *Criminal Injury Compensation Act* —
  Award for Pain and Suffering #1
  #98-1429, 9 September 1998

  It is permissible for the Board to consider awards in civil court actions regarding awards for pain and suffering in the absence of official policy guidelines regarding the Criminal Injury Compensation Act. However, this approach should be taken with some caution, as it is preferable to rely on internal bases of comparison within the Criminal Injury Compensation Act administration in order to achieve consistency within the statutory scheme. Court awards are the result of purely adversarial process and may be affected by such variables as the competence or strategies of legal representatives. The criminal injury compensation scheme, on the other hand, functions on an inquiry basis, with the Board having responsibility for collecting the information necessary to make fair decisions. The Appeal Division

panel concluded an award of $18,000 was appropriate for head injuries sustained in a criminal assault which resulted in permanent cognitive deficits and loss of sense of smell.

- *Criminal Injury Compensation Act* —
  Award for Pain and Suffering #2
  #99-0458, 11 March 1999

  All compensation awarded under the Criminal Injury Compensation Act is discretionary and is intended to provide some compensation for the harm suffered by the victim. However, the Act does not provide for full restitution. Nor are awards under the Act comparable in magnitude to awards arising out of civil litigation. Factors used to assess pain and suffering awards include the nature of the injuries sustained and medical treatment required, the age or mental competence of the victim, the duration of any physical or psychological disability, the severity of the symptoms and whether they constitute a permanent disability, and the impact of the injuries on the victim's ability to carry out and enjoy the normal activities of life. Sexual abuse claims require consideration of these factors, as well as the nature of the abuse, the length of time over which it occurred, the number of perpetrators, and whether force or threats of violence, actual violence or weapons were used. Medical and psychological evidence, as well as the victim's own evidence, is generally considered in the assessment of non-pecuniary loss. Consideration of these factors supports the principle that like cases should be treated alike.

- Continuity of Income Benefits — New Policy
  #98-1883, 26 November 1998

  Continuity of income benefits are a form of vocational rehabilitation benefit that is paid pursuant to item #89.11 of the Rehabilitation Services & Claims Manual. This item of policy was amended in 1998 with the amendments indicating, among other things, that effective September 1, 1996, continuity of income payments would continue until the pension is awarded, except in enumerated circumstances, including that the worker had retired. The Appeal Division panel applied the new provisions and found that the evidence did not

support the conclusion that the worker had retired or that he was precluded from participating from his vocational rehabilitation due to non-compensable problems, or that he refused to participate in the vocational rehabilitation process. None of the exceptions in policy applied in the present case.

- Adverse Reaction to Workplace Flu Vaccination
#99-0554, 30 March 1999

The employer offered a flu immunization for employees on a voluntary basis at no cost. The employer actively encouraged, but neither required nor directed employee participation in the program. The inoculations were administered by a fellow employee at the workplace, during paid work time, using materials and vaccine supplied by the employer. The only reason the worker agreed to have the flu vaccine was to protect her patients. The piercing of the worker's skin with the vaccine needle constituted a "personal injury" and the worker was in the course of her employment when she received the inoculation injury at the workplace, during paid work time. The inoculation was directly relevant to and in furtherance of the worker's performance of her normal job duties, given her frequent direct contact with immuno-compromised and immuno-suppressed patients. The Appeal Division panel found that the particular facts of the present case warranted a departure from the general policy guideline in item #19.41 of the Rehabilitation Services & Claims Manual against compensating an injury arising from a voluntary inoculation program.

- *Criminal Injury Compensation Act* – Motor Vehicle Exclusion
#99-0589, 7 April 1999

The motor vehicle exclusion in section 2(2)(a) of the Criminal Injury Compensation Act was applicable in relation to a claim of an individual who was a passenger in a motor vehicle involved in a high-speed police chase, resulting in a motor vehicle accident. The fact that the vehicle was driven in a manner that constituted a criminal offense did not convert the driving into an extraordinary or unusual use of the vehicle. Section 2(2)(a), by specifically referring to an offense arising out of the operation of a motor vehicle, seems to

contemplate the unlawful operation of a motor vehicle. Moreover, the purpose of the exception appears to be to assign compensation for motor vehicle related criminal injuries to the automobile insurance scheme. The claimant's injuries were consistent with the type of injuries that generally come within the scope of that scheme, that is, head injuries resulting from being a passenger in a recklessly driven vehicle. The claim for compensation remained denied.

- Section 55 — Time for Filing —
  Disease Not Previously Recognized As An Occupational Disease
  #99-0783, 12 May 1999

  See summary of this decision under the Policy Matters section [section 8] of this Annual Report.

- Access to Medical Review Panel — Medical Issue In Dispute
  #99-0816, 20 May 1999

  There is an abstract dispute between a doctor's certificate for appeal to a Medical Review Panel and the prior Appeal Division decision in that the appeal commissioner in the Appeal Division decision expressly stated he was unable to relate the worker's current fall to a compensable impairment. The certificate for appeal states that the doctor disputes the decision that the Board is not satisfied the worker fell as a result of his earlier fracture infusion. The Appeal Division panel in the present case concluded that an abstract dispute owing to the problems with the factual circumstances is insufficient to be a basis for an appeal to a Medical Review Panel. The problems with the factual circumstances suggests the dispute precluding acceptance of the claim is not truly a medical dispute that can be resolved by the Medical Review Panel as required by the statute.

- Whether Personal Optional Protection (POP) Entitles Operator To Minimum Compensation Under Sections 22 and 29
  #99-1232, 17 August 1999

  See summary of this decision under the Section 96(4) Referrals section [section 7(l)] of this Annual Report.

- Section 96(4) Referral —
  Board's Use of ARCON For PFI Examinations
  #99-1252, 20 August 1999

  See summary of this decision under the Section 96(4) Referrals section [section 7(l)] of this Annual Report.

- Travelling Workers
  #98-1256, 12 August 1998, 15 W.C.R. 231

  The very nature of a job of a home care worker is to provide services in various clients' homes. The home care worker is required to travel to the client's home to do her work, and her work typically involves travelling from client to client. Whether she does so in her own vehicle or one supplied by her employer or by public transit, or whether she is paid mileage or wages from home or between clients, does not affect the essential characterization of her work as a "travelling worker". She is "employed to travel" in the words of item #18.00 of the Rehabilitation Services & Claims Manual. The Appeal Division panel questioned whether persons employed to travel can lose their status as "travelling workers" on the way to the first client just because they have repeatedly visited that client first.

- Report to Employer — Section 53
  #96-1323, 26 August 1996

  Care must be taken in the application of section 53 so that its requirements are not applied in such an onerous fashion that they substitute a more stringent or higher standard for reporting than was intended. The Appeal Division panel stated that section 53(4)(c) may be interpreted broadly to include several considerations. Regard may be had to the fairness of the decision to bar the worker's claim based upon the reasons for the delay in reporting to their employer and to the merits of the case irrespective of the reasons for the delay in reporting. Consideration of the merits of the case may reasonably include both whether there is any obvious merit to the case, and the nature and extent of the worker's injury. The more serious the impact of the injury upon the worker, the more compelling will be the argument for proceeding with the decision on the merits of the case.

- Appeal Division Decision #24 —
  Practice and Procedure Directive —
  Contact with Appeal Commissioners by Parties
  10 February 1999, 15 W.C.R. 107.

- Appeal Division Decision #25 —
  Delegation by the Chief Appeal Commissioner
  30 June 1999

- Appeal Division Decision #26 —
  Delegation by the Acting Chief Appeal Commissioner
  3 August 1999

- Appeal Division Decision #27 — Appeal Practice and Procedure Regarding Occupational Health and Safety Matters
  1 October 1999

- Appeal Division Decision #29 – Public Access to Appeal Division Decisions – Writing Decisions without Reference to Identifiers
  20 December 1999

  See summary of Decisions #24 to #29 under the Practice and Procedure section [section 5] of this Annual Report.

10. MATTERS PENDING BEFORE THE APPEAL DIVISION

The table below indicates the change in new matters pending at the start of 1999 compared to December 31, 1999. The increase in matters pending over the course of 1999 is primarily due to one source. Approximately 95% of the increase in matters pending is attributable to employer relief of costs appeals under section 39(1)(e). The Appeal Division experienced approximately a 26 per cent increase in such appeals in 1999 over 1998.

Description	***Pending as of December 31, 1998***	***Pending as of December 31, 1999***
Appeals from Review Board	902	953
Review Board referrals	3	3
Prevention	59	17
O.H.S. (Bill 14)	N/A	16
Employer relief of costs	1307	2590
Criminal injuries	94	70
Employer charged with costs [s.47(2)]	13	20
Assessments	28	37
Ombudsman [reconsideration 96(2)]	1	0
Transfer of claim costs [s.10(8)]	10	1
Certificates for court action	86	126
Reconsideration [s.96.1]	37	45
Reconsideration [s.96(2)]	6	3
Extension of time to appeal	104	88
Total	***2650***	***3969***

11. ORAL HEARINGS

The Appeal Division held 154 oral hearings during 1999. Seventy-two were heard by non-representational appeal commissioners sitting alone. Eighty-two were heard by panels of three appeal commissioners.

The total number of decisions issued in 1999 was 2020; oral hearings were held in 7.6% of cases. This represents a small increase from the figures of 7% in 1998 and 7.4 % in 1997. The Appeal Division held oral hearings in 8% of cases in 1996, 7.4%, in 1995, 9% in 1994 and 10% in both 1993 and 1992.

Of the 154 oral hearings during 1999, 130 concerned claims issues, 18 related to employer prevention penalty appeals, 4 related to employer assessment appeals, and 2 related to section 11 determinations.

Ninety-six (62%) of oral hearings were held at the Richmond offices of the Board. Fifty-eight (38%) were held in locations around the province outside the lower mainland. These hearings were held in the following locations: Courtenay (1), Cranbrook (2), Fort St. John (1), Kamloops (16), Kelowna (5), Nanaimo (13), Penticton (2), Prince George (3), Terrace (2), and Victoria (13).

The following table provides information regarding the number of oral hearings held outside the Lower Mainland since 1992:

Year	Total oral hearings	Hearings held outside the Lower Mainland	
		Number	As a % of total oral hearings
1999	154	58	38%
1998	143	50	35%
1997	130	44	34%
1996	158	45	28%
1995	118	28	24%
1994	140	34	24%
1993	184	49	27%
1992	202	24	12%

In 1999 interpreters were utilized in 9 oral hearings, in the following languages: Portuguese (1), Polish (2), French (1), Laotian (1), Mandarin (2), Spanish (1), and Vietnamese (1). Interpreters were used in 9 hearings in 1998, 6 hearings in 1997, 14 hearings in 1996, 10 hearings in 1995, and 16 hearings in 1994.

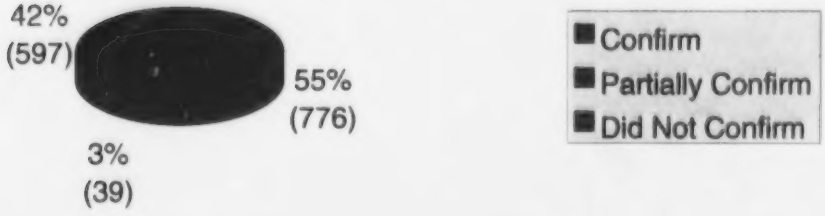
12. MEDICAL REVIEW PANEL APPEALS

As of January 18, 2000, 1486 Medical Review Panel certificates had been issued on appeals from Appeal Division decisions since June, 1991. This is 277 more certificates than had been issued as of January 26, 1999. There are a further 241 appeals proceeding to Medical Review Panels from Appeal Division decisions.

There were approximately 10,700 Appeal Division decisions issued between June 1991 and December 1999 on section 91 appeals from Review Board findings. The 1727 Appeal Division decisions which have proceeded, or are proceeding, to a Medical Review Panel represents approximately 16% of decisions on section 91 appeals over the past eight years.

In the 1486 completed Medical Review Panel appeals, 74 await implementation by the Board's Compensation Services Division. Until that occurs we cannot state whether the Appeal Division decision in those cases has been confirmed, partially confirmed, or not confirmed. However, 1412 Medical Review Panel certificates have been implemented with the following results. The Appeal Division decision was confirmed in 776 cases (55%), partially confirmed in 39 cases (3%), and not confirmed in 597 cases (42%).

MEDICAL REVIEW PANEL APPEALS FROM APPEAL DIVISION DECISIONS: JUNE 1991 TO 1999



1340 (95%) of these appeals were initiated by workers or their dependents, and the remaining 72 (5%) were initiated by employers.

13. JUDICIAL REVIEW

Seven decisions were issued by courts in 1999 on judicial review petitions from Appeal Division decisions.

The Supreme Court of British Columbia dismissed six petitions.

The Supreme Court of Canada denied leave to appeal from a 1998 British Columbia Court of Appeal decision which restored a 1996 Appeal Division decision.

At year-end one appeal (Kovach v. Workers' Compensation Board, *Appeal Division Decision #93-1399, 10 WCR 603 - Section 11 certificate – medical malpractice claim)* remained before the Supreme Court of Canada. The Supreme Court of Canada heard oral argument on the appeal on January 20, 2000. The unanimous seven-person court panel, in a brief judgment, allowed the appeal from a 1998 British Columbia Court of Appeal decision which had set aside the 1993 Appeal Division decision. The Supreme Court of Canada restored the Appeal Division's section 11 determination.

Since the inception of the Appeal Division in 1991, decisions from the courts have been rendered in relation to 22 Appeal Division decisions. The Appeal Division decision has, to date, been ultimately upheld by the courts in all cases.

The following are summaries of the seven court decisions in 1999 in relation to petitions for review of Appeal Division decisions.

(1) Watford v. Workers' Compensation Board
(25 January 1999) Vancouver #A972591 (B.C.S.C.) 15 WCR 305
Appeal Division decision #95-0185 (21 Feb. 1995) 15 WCR 133
(Whether a person was a "worker" at the time of injury)

The petitioner suffered serious and permanent injuries in 1992 when he accidentally came in contact with a power line while working on a contract for an employer. While his firm was registered with the board, the petitioner had not taken out personal optional protection for himself. The Appeal Division panel concluded that the petitioner was not a worker under the Act and was not entitled to compensation for his injuries.

The British Columbia Supreme Court justice determined that, in light of the privative provision in section 96(1) of the Workers Compensation Act, the Appeal Division decision was only subject to review if its decision was patently unreasonable or if the Appeal Division made an error in the interpretation of a legislative provision limiting the tribunal's power. The court concluded the Appeal Division decision was not patently unreasonable.

Among other things, the petitioner had argued that the Appeal Division committed a breach of natural justice by not providing the petitioner with an oral hearing before the Appeal Division panel. The appeal commissioner had concluded that it was not necessary in this case to provide an oral hearing given the nature of the issues to be resolved and the opportunities provided to the parties to make full written submissions. The court found the petitioner did have this opportunity extended to him. The court concluded there was not a breach of natural justice.

The petitioner also argued that the appeal commissioner's decision was a blind application of governors' policies. The court concluded there would appear to be no doubt that the appeal commissioner can apply and ordinarily would be obliged to apply the appropriate policies of the governors and that such policies are not to be applied blindly. The court stated it found no evidence of policies being blindly applied.

The petition for judicial review was dismissed.

(2) Suranyi v. Workers' Compensation Board of British Columbia
(28 May 1999) Vancouver #A983373 (B.C.S.C.)
Appeal Division Decision #96-1581 (15 October 1996)
(Legal fees)

The worker sought judicial review of a number of matters including an issue related to reimbursement of legal fees considered as part of an October 15, 1996 Appeal Division decision (#96-1581). The judicial review petition also sought an order requiring the issuance of a 100% pension pursuant either to sections 22, 23(1), or 23(3) of the Workers Compensation Act. The Supreme Court of British Columbia dismissed the petition for judicial review.

Regarding legal fees, the Appeal Division decision panel had noted the general policy of the governors is that fees for an advocate are not paid by the Board. That is always subject, the panel said, to consideration of the merits of the individual situation. In the Appeal Division panel's view, the case was appropriately adjudicated without additional legal assistance. The panel therefore denied the request for legal fees. A similar decision denying payment of legal fees was made on this claim in a 1991 Appeal Division decision (#91-0928).

In considering the matter, the court noted a number of matters related to the petitioner's claim were still to be determined by the Board, including a section 96(4) referral by the president of the Board to the Appeal Division from a July, 1998 Review Board finding. Regarding the petitioner's request for an order compelling an award of a 100% pension, the court stated adequate alternative remedies were underway. While the lack of a decision during further evaluation may, at some time in the future, be grounds to make an order on judicial review, the court stated this was not the case at the present time. The court dismissed the aspect of the petition regarding a pension.

The court also dismissed that aspect of the petition related to the denial of payment for legal fees. The court noted that to the date of the hearing of this petition, the petitioner incurred over $56,000 in legal fees and costs to appeal decisions of the board and to present argument and evidence to the Board, the Review Board, the Appeal Division, and the Medical Review Panel Department.

The court noted section 100 of the Act which allows the Board to award a sum it considers reasonable to the successful party to a contested claim to meet the expenses of the party incurred by reason of the contest. Policy at item #100.40 of the Rehabilitation Services and Claims Manual states no expenses are payable to or for any advocate nor does the board pay fees for legal advice or advocacy in connection with a claim for compensation. The court noted that it is apparently well known in the legal community, members of which deal with the Board, that this policy has been in effect for some period of time and is seldom breached.

The court stated that the two Appeal Division decisions denying an award of legal fees were given after consideration of the merits of the applications. The Appeal Division could therefore not be said to have fettered its discretion. In both decisions, the court noted, the appeal commissioners expressed the view that the policy is a general policy subject to a consideration of the merits of the individual situation and gave reasons why the payment of legal fees was not warranted in those two situations. The court therefore denied the judicial review petition on the legal fees issue. The court stated the Board has a discretion to make an award for costs. The Board does not have a duty to make an award for costs.

The worker filed a Notice of Appeal from the British Columbia Supreme Court decision in the British Columbia Court of Appeal on June 3, 1999.

(3) Van Unen v. Workers' Compensation Board of B.C.
(5 August 1999) Vancouver #A983143 (B.C.S.C.)
Appeal Division Decisions #93-1031, #94-0794, #95-1102, #96-1062, #98-1127, and a November 18, 1998 letter from the deputy chief appeal commissioner
(Oral hearing and legal fees)

The British Columbia Supreme Court dismissed a petition for judicial review by a worker whose claims were the subject of a number of Appeal Division decisions. The court noted "the petitioner's complaints centre on the denial of oral hearings before the Appeal Division and the allegedly arbitrary denial of legal costs throughout."

The petitioner also invited the court to review the decisions on their merits in certain respects.

The court noted the jurisdiction of the Board in matters entrusted to it by the legislature is very broad. The Board is also "protected by a privative clause which has been finely tuned, over the years, as the jurisprudence has developed."

The absence of an oral hearing in relation to a number of the Appeal Division decisions was argued as being contrary to the principles of natural justice. The court stated the concept of natural justice or procedural fairness does not require oral hearings in every instance. The court noted that in relation to some of the decisions, the petitioner did not request an oral hearing. In this regard, the court said it is difficult to characterize the lack of a hearing in these instances as a denial of natural justice or procedural fairness where no hearing has been requested. In an instance when an oral hearing was denied the court noted it was clear the petitioner, through counsel, had a full opportunity to make written submissions on the appeal. The court found there was no breach of natural justice or procedural fairness.

In another instance that was a subject of the petition, the Appeal Division considered an appeal of a Review Board decision not to hold an oral hearing. The deputy chief appeal commissioner referenced Appeal Division Decision #1 (1991), 7 WCR 33, and concluded an appeal cannot be made to the Appeal Division solely on a procedural or preliminary determination such as a decision to deny an oral hearing. Therefore, the Appeal Division panel concluded the Review Board Registrar decision was not appealable to the Appeal Division. The court on judicial review stated that it agreed with the Appeal Division's conclusion as it relates to the Review Board's decision, as a preliminary matter, whether to hold an oral hearing in any case.

Regarding the allegation that the Appeal Division fettered its discretion in various denials of costs to the petitioner, the court referenced section 100 of the Act and items 100.40 and 100.50 of the Rehabilitation Services and Claims Manual. The court said that on their face, these policies are couched in mandatory language. The

court noted, however, that "[i]f the Appeal Division blindly applied these policies, I have no doubt that that would represent an improper fettering of the discretion to award costs found in s. 100 of the Act." The court also quoted extensively from the Appeal Division's "generic decision on legal fees in its decision #93-1687 [10 WCR 211]". The court also referred to the B.C. Supreme Court decision in Suranyi v. WCB (28 May 1999) where the court stated:

> In the case at bar, the two Appeal Division's decisions not to award legal fees were given after consideration of the merits of the application. The Commission cannot therefore be said to have fettered its discretion. In both cases, the Appeal Commissioners expressed the view that the policy is a general policy subject to a consideration of the merits of each individual situation and gave reasons why the payment of legal fees was not warranted in those two situations.

The court in the present case followed the reasoning in Suranyi.

Regarding the Appeal Division decisions denying the worker's claims in respect of lower back, right hip and right knee issues and a decision on a retroactive disability pension relevant to a left knee disability, the court said:

> These decision lie at the very heart of the board's expertise and jurisdiction. These decisions are reasoned and based upon the Appeal Division's review of expert medical evidence. In respect of them, I cannot and do not say that the Appeal Division's conclusions are "openly, evidently, clearly" unreasonable and that is the test which I should apply . . .

The petition for judicial review was dismissed.

The worker filed an appeal from the British Columbia Supreme Court decision in the British Columbia Court of Appeal on September 2, 1999.

(4) Greyhound Canada Transportation Corp. v. Workers' Compensation Board et al.
(9 September 1999) Vancouver A991450
Appeal Division Decision #99-0354/55
(Section 11 determination – fishers)

The Supreme Court of British Columbia dismissed the petition for judicial review of the Appeal Division's February 26, 1999 section 11 determination.

The section 11 determination arose from a court civil action related to a motor vehicle accident involving a bus owned and operated by Greyhound. The plaintiffs in the civil action were travelling on the bus. The panel found the two plaintiffs to be commercial fishers and, accordingly, each had the status of workers under the Act. They were travelling home to Victoria after the Prince Rupert fishing opening. The general proposition, the panel said, is that accidents which occur when workers are travelling between their homes and their normal places of work are not compensable. The panel found the general proposition was applicable here. Therefore, the injuries of the plaintiffs did not arise out of and in the course of their employment.

The court noted that in light of the privative clause contained in the Workers Compensation Act, "the Court should accord extreme curial deference to the WCB's decisions." The court noted that several court decisions have confirmed the exclusive jurisdiction of the board to determine worker status. The court indicated that the Appeal Division carefully considered a number of previous precedents, the relevant policy, and the factors of this particular case before concluding the plaintiffs were not in the course of their employment at the time of the accident. The court concluded that on all of the evidence it was reasonable for the Board to conclude the plaintiffs were not in the course of their employment at the time they were injured. The Appeal Division's decision, the court indicated, was not made in excess of its jurisdiction and cannot be described as "patently unreasonable".

The petitioner has filed an appeal from the court's decision in the British Columbia Court of Appeal.

(5) Canada Safeway Limited, et al. v.
Retail Merchants Assoc. of B.C., et al.
(16 September 1999) S.C.C. #27082
Appeal Division Decision #96-0333, 12 WCR 29
(Restructuring subclass 0621)

A three-person panel of the Supreme Court of Canada, on September 16, 1999, dismissed the application for leave to appeal to that court from the November 19, 1998 decision of the British Columbia Court of Appeal [15 WCR 121]. The Court of Appeal had reinstated the Appeal Division majority decision #96-0333, 12 WCR 29 (2 March 1996) by overturning a 1997 British Columbia Supreme Court decision which had quashed the Appeal Division decision. Details of this matter can be found in the Judicial Review segment of the Appeal Division's 1998 Annual Report.

(6) Boutsakis v. Canadian Airlines International and
Workers' Compensation Board of B.C.
(26 November 1999) Vancouver #A990853
Appeal Division Decision #98-0625
(Noise-induced hearing loss)

The worker sought to quash an Appeal Division decision which denied the worker's claim for hearing loss that the worker attributed to the level of noise in his work environment as a teletypist for an airline. The Appeal Division panel relied upon a consultant's report which concluded the noise level at the worker's workplace was well below the relevant threshold.

The court stated that on an application for judicial review the question is not whether the Appeal Division was right in its assessment of the evidence and the conclusion it reached but only whether there was some evidence to support the Appeal Division's conclusion. The court determined there was clearly some evidence. Further, the court said, the worker showed no evidentiary basis that the Appeal Division was in any way biased against him. The court concluded the

worker's case was fully heard and properly adjudicated upon. The petition was therefore dismissed.

(7) Demmon v. Workers' Compensation Board of B.C.
(9 November 1999) Vancouver #A990009 (B.C.S.C.)
Appeal Division Decision #97-0018
(Whether second medical review panel to be established)

The British Columbia Supreme Court dismissed this petition for judicial review of the Appeal Division decision.

The Appeal Division panel determined, among other things, that a 1987 Medical Review Panel (MRP) with specialists from neurology, had jurisdiction to deal with an issue of whether the worker had a psychological disability at that time. The MRP decided he did not have a disability of any kind at that time and that his condition was good. The Appeal Division panel confirmed the MRP certificate was final and conclusive. The Appeal Division panel concluded the certificate superceded earlier decisions by the former commissioners and the Appeal Division could therefore not reconsider such a decision of the former commissioners.

The court stated the test on review was whether the Appeal Division decision was patently unreasonable. The court concluded the decision was not patently unreasonable and consequently dismissed the petition.